(i)

No. 94-7448-CFY
Status: GRANTED

Title: Roland J. Bailey, Petitioner
v.
United States

Docketed:
December 28, 1994

Court: United States Court of Appeals for the District of Columbia Circuit

Vide:
94-7492

Counsel for petitioner: Englert Jr.,Roy T.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Dec 28 1994	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Jan 19 1995		Order extending time to file response to petition until February 27, 1995.
5	Feb 28 1995		Order further extending time to file response to petition until March 6, 1995.
7	Mar 6 1995		Brief of respondent United States in opposition filed. VIDED.
6	Mar 7 1995		Reply brief of petitioner filed.
8	Mar 9 1995		DISTRIBUTED. March 24, 1995 (Page 5)
9	Mar 27 1995		REDISTRIBUTED. March 31, 1995 (Page 12)
11	Apr 10 1995		REDISTRIBUTED. April 14, 1995 (Page 26)
15	Apr 17 1995		Petition GRANTED. The case is consolidated with No. 94-7492, Robinson v. United States, and a total of one hour is allotted for oral argument. **********
17	May 11 1995		Order extending time to file brief of petitioner on the merits until June 22, 1995.
18	May 25 1995		Joint appendix filed. VIDED.
19	Jun 14 1995		Order further extending time to file brief of petitioner on the merits until June 30, 1995.
20	Jun 27 1995		Brief amicus curiae of James Doe filed. VIDED.
21	Jun 30 1995		Brief of petitioner Roland J. Bailey filed. VIDED.
22	Jul 31 1995		Brief of respondent United States filed. VIDED.
23	Aug 30 1995		Reply brief of petitioners filed. VIDED.
24	Aug 30 1995		LODGING consisting of 12 copies of an article by Michael Geis and 12 copies of an article by Clark Cunningham submitted by counsel for the petitioners.
25	Sep 5 1995		SET FOR ARGUMENT MONDAY, OCTOBER 30, 1995. (1ST CASE).
26	Sep 5 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the District of Columbia Circuit.
27	Sep 11 1995		CIRCULATED.
28	Sep 15 1995		Record filed.
		*	Original record proceedings United States District Court for the District of Columbia Circuit.
29	Oct 30 1995		ARGUED.

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ORIGINAL

No. 94-94-7448

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

Supreme Court, U.S.
FILED
4 1994
OFFICE OF THE CLERK

ROLAND J. BAILEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the 5-4 decision of the court below misinterpreted 18 U.S.C. § 924(c)(1) -- which imposes a mandatory 5-year consecutive sentence on a person who "uses or carries" a firearm "during and in relation to" a drug trafficking offense -- by adopting a standard that looks solely to the "proximity and accessibility" of the firearm to the drugs or drug proceeds rather than to active employment of the firearm.

RULE 14.1(b) STATEMENT

In addition to the parties listed in the caption, Candisha S. Robinson was a defendant in an unrelated criminal prosecution, which the court of appeals consolidated with this case for purposes of rehearing in banc.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No. 94-

ROLAND J. BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Roland J. Bailey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the in banc court of appeals (App., *infra*, 1a-21a) is reported at 36 F.3d 106. The order granting rehearing en banc (App., *infra*, 22a-23a) is reported at 4 F.3d 1004. The opinion of the panel of the court of appeals (App., *infra*, 24a-32a) is reported at 995 F.2d 1113.

JURISDICTION

The court of appeals entered its judgment on October 4, 1994. App., *infra*, 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 924(c)(1) of Title 18 provides, in pertinent part: "Whoever, during and in relation to any crime of violence or drug trafficking crime * * * uses or carries a firearm, shall, in addition to the punishment provided for such crime * * *, be sentenced to imprisonment for five years * * *, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment * * *."

STATEMENT

1. On May 2, 1988, two police officers stopped petitioner Roland J. Bailey when they noticed that the car he was driving had no front license plate and no inspection sticker. App., *infra*, 3a. Bailey was ordered out of the car when he produced a District of Columbia identification card in response to the officers' request for his driver's license. *Id.* at 3a, 25a. The officers searched the passenger compartment of the car and discovered a satchel containing 30 grams of cocaine. *Id.* at 3a.

After arresting Bailey, the officers unlocked the car trunk (which was inaccessible from the passenger compartment) and found a vest containing approximately $2500 in cash.[1] The police also found, beneath "a whole lot of items" including "clothing and bags and other things," a bag containing a 9-mm. gun. 2/27/90 Tr. 93-94, 108. The police officers could not see the gun when the trunk

[1] The court below twice misstated the record in declaring that the trunk contained $3216 (App., *infra*, 3a, 25a). In fact, undisputed record evidence shows that the police found a *total* of $3216, but that only about $2500 was in the trunk; the remaining $700 was on Bailey's person. 2/27/90 Tr. 97.

was opened (*id.* at 82, 109); indeed, the trunk was so full that it took roughly one minute to find the bag containing the gun (*id.* at 109). Both officers testified that they did not see Bailey do anything other than drive the car. *Id.* at 76, 107-108.

2. The government charged Bailey in a three-count indictment with (1) possession of cocaine with intent to distribute it, (2) using or carrying a firearm during and in relation to a drug trafficking crime, and (3) illegal possession of a firearm. At trial, Detective DiDomenico, a government expert, testified that the quantity of cocaine in Bailey's car indicated that it was intended for street sale, and that drug dealers frequently have a firearm "on their person or within reach" (2/27/90 Tr. 161) to protect themselves, "their assets, drugs and money" (App. *infra*, 3a-4a). Detective DiDomenico testified further that the purpose of having a firearm within reach was for protection against "stickup boys" who try to steal the drugs or money. 2/27/90 Tr. 164-167. DiDomenico emphasized that a drug seller would need immediate access to his firearm because he would get no notice before a "stickup boy" confronted him:

> Q. (by defense counsel): In all your experience talking with the stickup boys, did any of them ever tell you that they ever gave the person they were sticking up an opportunity to go get their gun first?
>
> A. (DiDomenico): That's ridiculous, no.

2/27/90 Tr. 167. Significantly, the gun in this case was not on Bailey's person or within his reach: it was buried amidst clothing and other innocuous items in the locked trunk of a moving car.

3. Bailey was convicted on all three counts of the indictment and was sentenced to concurrent 51-month terms on Counts I and III, and to a consecutive 60-month term on the Section 924(c)(1) conviction. App., *infra*, 4a. A panel of the United States Court of Appeals for the District of Columbia Circuit affirmed. *Id.* at 24a-30a.[2] Bailey had already completed his sentences on Counts I and III, and the only issue raised in his petition for rehearing and suggestion of rehearing in banc concerned his Section 924(c)(1) conviction for using or carrying a firearm during and in relation to his possession of cocaine with intent to distribute it.

The D.C. Circuit granted rehearing in banc and consolidated Bailey's case with the unrelated prosecution of another defendant, Candisha Robinson. App., *infra*, 22a-23a. A sharply divided court then affirmed Bailey's and Robinson's convictions under Section 924(c)(1). With only five judges subscribing to the majority opinion, the court held that, when the predicate drug trafficking offense is possession with intent to distribute, the prosecution need only show (1) that a firearm was located near the drugs or drug proceeds, and (2) that the gun was sufficiently accessible at some point during the drug possession to have been available for use if the need arose. App., *infra*, 3a, 13a.

The court held that one "uses" a gun within the meaning of Section 924(c)(1) by placing *or keeping* the gun in a location "from

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[2] The D.C. Circuit had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1294(1); the United States District Court for the District of Columbia had original jurisdiction pursuant to 18 U.S.C. § 3231.

which one (or one's agent) can gain access to it *if and when needed to facilitate a drug crime.*" App., *infra*, 10a (emphasis added). While recognizing that Section 924(c)(1) does not criminalize "the mere possession of a firearm by someone who commits a drug offense" (*id.* at 4a), the court reasoned that "use" is an "expansive[]" term that does not require active employment of a gun. *Id.* at 9a-10a (citing *Smith* v. *United States*, 113 S. Ct. 2050, 2054, 2058 (1993)). Thus, the court concluded that a jury can infer "use" whenever the *potential for use* inheres in the location of the gun. The court held further that, when the predicate drug offense is a "continuing offense" such as possession with intent to distribute, the government need only show that the gun was located near the drugs "at some point" in time during the defendant's possession of drugs. App., *infra*, 10a.

The majority also held that a firearm is used "during and in relation to" a predicate drug offense if it is "positioned so as to be available for use during ongoing drug activity." App., *infra*, 11a. The court stressed that the gun did not have to "further" the drug offense, provided that its location suggests that it had the *potential* to facilitate the drug offense. *Ibid.*

Applying those standards, the court concluded that the gun in the locked trunk of Bailey's car was "used" because it was "proximate to the drugs" in the passenger compartment. *Id.* at 12a. The court also ruled that the gun was used "during and in relation to" Bailey's illegal possession of drugs because the gun "was easily accessible to Bailey at any time." *Ibid.* The majority

opinion made no attempt to define the "carry" component of Section 924(c)(1) or to delimit the scope of "use" *vis-à-vis* "carry."

Judge Wald dissented in part. App., *infra*, 13a-15a. She stated that the majority's twofold standard for determining whether a firearm was "used" -- proximity of the gun to drugs or drug proceeds, and accessibility of the gun at some point during the possession offense -- "artificially limit[s]" the factors necessary to distinguish "use" from mere possession. *Id.* at 14a. Judge Wald identified several additional factors, such as the number and type of gun involved, whether the gun was loaded, and whether expert testimony supported an inference of "use," that are crucial for distinguishing "use" from mere possession. *Ibid.* Despite her staunch disagreement with the legal standard adopted by the majority, Judge Wald -- alone among the nine participating judges of the court of appeals -- concluded that Bailey's conviction could be affirmed through the application of a traditional balancing of the appropriate factors.

Judge Williams, joined by Judges Silberman and Buckley, dissented outright. App., *infra*, 15a-21a. Judge Williams faulted the majority's reliance on inferences of *potential* use, arguing that, under the plain meaning of the statutory term, "use" "normally implies activity." *Id.* at 15a, 16a (citing *United States* v. *McFadden*, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, C.J., dissenting)). The three-judge dissent expressly rejected the majority's reliance on *Smith* v. *United States* to extend "use" to encompass situations of potential use (App., *infra*, 19a):

> Nothing in *Smith* precludes limiting "use" to active employment. [*Smith's*] statement that "§ 924(c)(1)'s language sweeps broadly", 113 S. Ct. at 2054, means only that the proscribed use of firearms is not limited to the obvious or typical ways in which they may assist in the commission of a crime. Rather, a gun may be "used" regardless of whether it acts as an instrument to shoot, to bludgeon, or for exchange. That is, whether a firearm is "used" does not depend on whether it is employed in the customary way or a more creative way. But it does depend on whether the gun is employed at all, and nothing [in Smith] expands "use" beyond active employment.

Judge Williams also noted that Section 924 itself distinguishes between the actual use of a firearm, on the one hand, and the intent or potential for use, on the other. *Id.* at 18a. Subsection (d) of Section 924 provides for forfeiture of firearms "used in any knowing violation" of certain offenses, and of firearms "intended to be used" in other crimes. "Thus Congress [was] clearly quite alert to the distinction between firearms 'used' in commission of a crime and merely 'intended' for such use * * *." *Ibid.* Quoting this Court's observation in *Smith*, 113 S. Ct. at 2057, that "using a firearm" should not have a "different meaning in § 924(c)(1) than it does in § 924(d)," Judge Williams concluded that the majority opinion was inconsistent with Congress's choice not to reach mere "intent to use" in subsection (c). Finally, Judge Williams observed that the majority's definition of "use" was so broad "as to leave no apparent role" for the alternate element of "carrying" a firearm during and in relation to a drug offense. App., *infra*, 18a.

Judge Silberman, in addition to joining Judge Williams' dissent, filed a separate one-paragraph dissent. Stressing the "difficult[y] [of the] question presented" and the pressing need

for "a more coherent standard firmly rooted in the statute" -- which had led the court to grant rehearing in banc -- Judge Silberman lamented that the majority had not "marshaled the effort to confront fully the analysis set forth in [Judge Williams'] dissent." *Id.* at 21a.

REASONS FOR GRANTING THE PETITION

Two years ago, this Court noted divergences among the courts of appeals in their interpretations of Section 924(c)(1). *Langston* v. *United States*, 113 S. Ct. 361, 361-362 (1992) (White, J., joined by Thomas, J., dissenting from denial of certiorari). Those divergences have deepened with the passage of time. Currently, five courts of appeals unambiguously hold that mere possession of a firearm by someone who commits a drug offense is not sufficient to establish "use" under Section 924(c)(1).[3] Three courts of appeals, on the other hand, have definitively held that mere possession -- or even constructive possession -- of a firearm during a drug offense does suffice.[4] Three appear to have embraced

[3] See, *e.g.*, *United States* v. *Castro-Lara*, 970 F.2d 976, 983 (1st Cir. 1992), cert. denied, 113 S. Ct. 2935 (1993); *United States* v. *Wilson*, 884 F.2d 174, 177 (5th Cir. 1989); *United States* v. *Brown*, 915 F.2d 219, 224 (6th Cir. 1990); *United States* v. *Villagrana*, 5 F.3d 1048, 1051 (7th Cir. 1993); *United States* v. *Duke*, 940 F.2d 1113, 1118 (8th Cir. 1991).

[4] See, *e.g.*, *United States* v. *Paz*, 927 F.2d 176, 179 (4th Cir. 1991) (constructive possession of firearm sufficient to establish "use"); *United States* v. *Torres-Rodriguez*, 930 F.2d 1375, 1385 (9th Cir. 1991) (possession of firearm constitutes "use"); *United States* v. *Poole*, 878 F.2d 1389, 1393 (11th Cir. 1989) (same).

both of those irreconcilable holdings.[5]

The majority opinion below did nothing to harmonize the discord among the circuits; on the contrary, it added yet another dissonant voice by formulating a new standard for Section 924(c)(1) analysis that -- while coming dangerously close to equating "use" with mere possession -- is formulated differently from the standards employed in all of the other courts of appeals. This Court should grant certiorari to bring order to those substantial conflicts. Moreover, the correct interpretation of Section 924(c)(1) presents an important issue, particularly in light of the frequency with which the issue arises in the lower courts. Certiorari is also warranted because the decision below is erroneous.

I. THE DECISION BELOW CONFLICTS WITH THE INTERPRETATION OF 18 U.S.C. § 924(c)(1) BY SEVERAL OTHER COURTS OF APPEALS

In *Smith* v. *United States*, this Court held that the plain language of Section 924(c)(1) requires two elements to be proved

[5] Compare *United States* v. *Feliz-Cordero*, 859 F.2d 250, 254 (2d Cir. 1988) ("section 924(c) requires more than mere possession of a firearm"), with *United States* v. *Meggett*, 875 F.2d 24, 28 (2d Cir.) ("mere possession of a gun can constitute 'use'"), cert. denied, 493 U.S. 858 (1989). Compare *United States* v. *Theodoropoulos*, 866 F.2d 587, 597 (3d Cir. 1989) (mere availability of a firearm does not constitute use during and in relation to a drug offense), with *United States* v. *Hill*, 967 F.2d 902, 906-907 (3d Cir. 1992) (gun "used" if defendant had unimpeded access to it). Compare *United States* v. *Matthews*, 942 F.2d 779, 783 (10th Cir. 1991) (accessible gun not "used" within meaning of Section 924(c)(1) without evidence that the defendant "intended to avail himself of the firearm"), and *United States* v. *Sullivan*, 919 F.2d 1403, 1432 (10th Cir. 1990) (mere possession not enough), cert. denied, 113 S. Ct. 1013 (1993), with *United States* v. *Parrish*, 925 F.2d 1293, 1298 (10th Cir. 1991) (access to a gun establishes "use" if the defendant is involved in a drug trafficking offense).

beyond a reasonable doubt. First, the accused must have "use[d]" or "carrie[d]" the firearm; second, such use or carrying must have been done "during and in relation to" a drug trafficking offense. 113 S. Ct. 2050, 2058 (1993). The majority opinion in the court below adopted a "proximity and accessibility" standard for evaluating those two elements. App., *infra*, 13a. The court held that, as a matter of law, a firearm is "used" if it is kept in a location that is proximate to the location of drugs or drug proceeds. App., *infra*, 10a. The court then held that any such "use" of a firearm was necessarily "during and in relation to" a drug offense if the firearm was accessible to the accused -- that is, "positioned so as to be available for use" if the need arose -- at any time during the drug offense. *Id.* at 11a.

Under the approach of the court below, the inquiry for both elements focuses on the location of the firearm; if the location is such that the accused could retrieve and employ the firearm at any time during the drug offense, the elements of Section 924(c)(1) are met. The court rejected the notion that Section 924(c)(1) requires active or actual use of a firearm (App., *infra*, 9a); rather, the potential for use suffices. Furthermore, when the predicate drug offense is possession with intent to distribute, Section 924(c)(1) is satisfied if the jury could infer that the firearm was proximate and accessible *at any time* during the drug possession. *Id.* at 10a.

Decisions of the First and Second Circuits have squarely rejected the stark "proximity" test embraced by the court below. In *United States* v. *Torres-Maldonado*, 14 F.3d 95, 101-102 (1st

Cir.), cert. denied, 115 S. Ct. 193 (1994), the First Circuit reversed a Section 924(c)(1) conviction even though a gun was found in the same room as $4000 in cash, cocaine, and drug-dealing paraphernalia. That court expressly rejected the government's argument that the mere "physical proximity" of the gun to the drugs sufficed to establish use. Instead, the court looked for evidence that the defendant "exercised" dominion over the gun or "participated in armed drug deals." Finding no such evidence, the court reversed the conviction.

In *United States* v. *Feliz-Cordero*, *supra*, the Second Circuit reversed a conviction under Section 924(c)(1) on the ground that the presence of a firearm "in the same room as" drugs, drug proceeds, and drug paraphernalia "is not sufficient evidence to sustain a conviction." 859 F.2d at 254. The court reasoned that the presence of a firearm at the apartment did not constitute "use" because Congress did not intend to penalize the mere possession of a firearm during a drug offense. *Ibid.*; see also *United States* v. *Long*, 905 F.2d 1572, 1578 n.10 (D.C. Cir.) (Thomas, J.) ("A person can possess a gun without * * * 'using' it."), cert. denied, 498 U.S. 948 (1990).

Decisions of the Second and Sixth Circuits are inconsistent with the D.C. Circuit majority's position that, when the predicate drug offense is a "continuous offense" such as possession with intent to distribute, the presence of a firearm at the time of arrest supports an inference that the gun was used at some prior time during the possessory offense. See App., *infra*, 10a. In

United States v. *Lasanta*, 978 F.2d 1300, 1308-1309 (1992) (citing *Feliz-Cordero*, *supra*), the Second Circuit held that the possession of a firearm did not support an inference that the gun had provided protection at some prior drug transaction. In *United States* v. *Clemis*, 11 F.3d 597 (6th Cir. 1993), cert. denied, 114 S. Ct. 1858 (1994), the Sixth Circuit held that the presence of firearms in a house containing marked money from a controlled drug sale did not, standing alone, constitute "use" of those weapons (*id.* at 602 (emphasis added)):

> The government would have us recognize that the presence of the "marked" money establishes that the weapons found were used to protect the proceeds of a drug transaction, thereby facilitating the drug transaction. We cannot make this jump. While we agree that the terms of [Section 924(c)(1)] are to be construed broadly, *it is still the law that mere possession of a weapon during the course of criminal conduct is not enough.*

Numerous decisions have rejected the broad "accessibility" test approved below for establishing that a firearm was used or carried "during and in relation to" the predicate drug offense. In *United States* v. *Theodoropoulos*, 866 F.2d 587 (1989), for example, the Third Circuit reversed a Section 924(c)(1) conviction even though drugs were found inside an apartment and loaded guns were discovered outside on the porch. The court held that "the mere availability of a firearm nearby * * * [does not] equal * * * use 'in relation to'" a drug trafficking offense. *Id.* at 597. The court reasoned that the accessibility test urged by the government impermissibly extended Section 924(c)(1) to situations in which a firearm was merely possessed during a predicate offense: "Had [Congress] intended the provision to encompass possession of a

firearm during a drug trafficking offense it would have so provided." *Id.* at 597-598.

Likewise, the Tenth Circuit has repeatedly rejected the argument that the government need only show that a firearm was accessible at some time during a drug offense to meet the "during and in relation to" test. In *United States* v. *Connor*, 972 F.2d 1172, 1174 (1992), the court held that "[m]ere access to a firearm is insufficient to sustain a conviction" because access alone cannot prove that the firearm was an "integral part of the drug trafficking offense." In *United States* v. *Matthews*, 942 F.2d 779, 783 (10th Cir. 1991), the court reversed a Section 924(c)(1) conviction even though it found that a firearm was accessible to the defendant during the drug offense: "[S]ection 924(c)(1) requires more than mere access to a firearm." See also *United States* v. *Sullivan*, 919 F.2d 1403, 1432 & n.45 (10th Cir. 1990) (access to firearm, standing alone, is insufficient to support a Section 924(c)(1) conviction).

The decision below also conflicts with decisions from other courts of appeals in that it curtails the number of factors that courts may consider in determining whether a firearm was used or carried during and in relation to a drug offense. In the D.C. Circuit, it is now the law that only two factors are relevant in Section 924(c)(1) analysis: the proximity of the firearm to drugs or drug proceeds, and the accessibility of the firearm. See App., *infra*, 3a. The court has discarded several other factors on which prior panel opinions had relied, stating that such factors

"produced widely divergent and seemingly contradictory results." *Id.* at 7a. Other courts of appeals, however, employ those very factors in Section 924(c)(1) analysis.

The First and Second Circuits have both relied on a factor rendered completely irrelevant by the decision below -- the absence of evidence of an drug actual transaction -- in reversing Section 924(c)(1) convictions. See *Feliz-Cordero*, 859 F.2d at 254; *Torres-Maldonado*, 14 F.3d at 101-102. The First, Second, and Eighth Circuits have relied on the type and number of firearms involved in determining whether an inference of "use" was justified. See *United States* v. *Hadfield*, 918 F.2d 987 (1st Cir. 1990), cert. denied, 500 U.S. 936 (1991); *Feliz-Cordero*, 859 F.2d at 254; *United States* v. *Lyman*, 892 F.2d 751, 753 (8th Cir. 1989), cert. denied, 498 U.S. 810 (1990). That factor, too, has now been rendered irrelevant in the D.C. Circuit by the opinion below.

The opinion below is inaccurate in stating that "[e]very other circuit similarly focuses, in essence," solely on the proximity and accessibility factors. App., *infra*, 8a. To the contrary, while every circuit does indeed apply those two factors, *only* the D.C. Circuit excludes all others from consideration. See App., *infra*, 13a (Wald, J., dissenting) ("the majority's new 'proximity and accessibility' test offers only a straightjacket [*sic*]" for judges faced with "a steady stream of new fact situations"). The majority opinion itself acknowledged that its truncated Section 924(c)(1) analysis conflicted with the approach of at least one other court of appeals. App., *infra*, 9a (citing *United States* v. *Taylor*, 18

F.3d 55, 58 (2d Cir.) (analysis of sufficiency challenge to Section 924(c)(1) conviction "is clearly a very fact-intensive question [that] requir[es] a careful examination of, among other things, where the gun was located and what else was found in the apartment"), cert. denied, 114 S. Ct. 2720 (1994).

Bailey's conviction under Section 924(c)(1) would have been reversed if the D.C. Circuit had not crafted its new two-factor test for evaluating the sufficiency of the evidence against him, because the evidence showed (at most) that Bailey possessed a gun. First, there was no proof of any actual drug transaction at which the gun in the trunk played a role. The only activity Bailey engaged in was driving a car; the presence of the gun in the locked trunk of that moving car had no role, active or otherwise, in his possessory crime. See *Feliz-Cordero*, 859 F.2d at 254 (reversing Section 924(c)(1) conviction where there was no evidence of a specific drug transaction involving the firearm); *Torres-Maldonado*, 14 F.3d at 101-102 (same). Second, the gun was sufficiently removed from Bailey to preclude an inference that he derived any service from it. Indeed, the government conceded that "the firearm was relatively inaccessible." United States' Response to Appellant's Petition for Rehearing With Suggestion For Rehearing En Banc, at 2. Compare *Theodoropoulos*, 866 F.2d at 597 (reversing Section 924(c)(1) conviction where firearm was "nearby" but not within reach); *Feliz-Cordero*, 859 F.2d at 254 (reversing Section 924(c)(1) conviction where the firearm in dresser drawer was not sufficiently accessible); and *Matthews*, 942 F.2d at 783-784

(reversing Section 924(c)(1) conviction where gun in different room was removed from defendant's access), with *United States* v. *Featherson*, 949 F.2d 770, 772 (5th Cir. 1991) (affirming Section 924(c)(1) conviction where firearm was within six to eight feet of defendant in apartment), cert. denied, 112 S. Ct. 1771 (1992).

Third, only a single firearm was found in the trunk of Bailey's car. Although a single weapon can support an inference of "use" in appropriate cases, a purely circumstantial showing of "use" is greatly weakened by the fact that no other weapons were present. See, *e.g.*, *Hadfield*, 918 F.2d at 991 (presence of nine firearms supported inference of "use"); *United States* v. *Matra*, 841 F.2d 837, 843 (8th Cir. 1988) (presence of seven guns, including assault rifle and submachine gun, in a crack house supports inference of "use").

The majority opinion's "proximity and accessibility" standard, combined with its willingness to let juries infer past usage of a firearm from present possession, short-circuited the Section 924(c)(1) analysis that would have been applied in other circuits. Bailey's conviction was upheld on evidence that showed nothing more than the possession of a firearm simultaneous with a drug trafficking offense. Many other circuits would reverse a Section 924(c)(1) conviction based only on such a showing. See notes 3 & 5, *supra*.

II. THE CORRECT INTERPRETATION OF SECTION 924(c)(1) IS A QUESTION OF GREAT IMPORTANCE

The lower courts have been called on with increasing frequency to determine the proper scope of Section 924(c)(1). See *Langston*, 113 S. Ct. at 362 (White, J., joined by Thomas, J., dissenting from

denial of certiorari) ("this issue arises with some frequency"). The courts of appeals have issued hundreds of rulings -- published and unpublished -- in the last few years in which the principal issue on appeal has been whether the evidence met the legal standard to support a conviction under Section 924(c)(1). The district courts must resolve that issue even more frequently.

The conflicts among the courts of appeals that two Justices noted in 1992 still "show[] no signs of abating." *Langston*, 113 S. Ct. at 362 (dissent). To the contrary, the discussion above illustrates that the divisions have become deeper and more numerous. Resolution by this Court of the proper interpretation of Section 924(c)(1) is necessary to promote uniformity in the courts of appeals and to prevent applicability of this federal statute from depending on the fortuity of the defendant's locale.

Section 924(c)(1) convictions entail serious consequences for defendants. If a defendant is convicted under Section 924(c)(1), the trial court is required to add a five-year *consecutive* sentence to the sentence for the defendant's underlying crime. The trial court has no discretion in the matter, nor can the Sentencing Guidelines lessen the blow. In some cases, such as Bailey's, the Section 924(c)(1) violation more than doubles the punishment for the underlying offense.

This case presents a singularly appropriate vehicle for this Court to address the meaning of "use" of a firearm "during and in relation to" a drug trafficking offense. Although the issue arises in varying fact patterns, Bailey's case -- involving a gun that the

government has conceded was "relatively inaccessible" in the locked trunk of a moving vehicle -- represents one typical scenario, and one clearly at the outer fringes of the government's plausible candidates for a "use" prosecution. The issue was explored with unusual thoroughness in this case, and the D.C. Circuit majority's attempt to craft a bright-line rule, while in conflict with other circuits and (we submit) ultimately misguided, sharpens the issues for this Court's consideration -- a feature lacking in most Section 924(c) cases. The thoughtful dissenting opinions below likewise will aid this Court's consideration of the issue presented. If this Court wishes ever to address the important and recurring -- but elusive -- issue of the scope of Section 924(c)(1), this case is an unusually compelling candidate for review.

III. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS

Unanimously declining to go as far as the Fourth, Ninth, and Eleventh Circuits (and panels of the Second, Third, and Tenth), see notes 4 & 5, *supra*, the D.C. Circuit correctly conceded that Congress did not intend in Section 924(c)(1) to reach mere possession of a firearm. App., *infra*, 4a. The majority then attempted to draw a line between possession and use, but the line it drew is invisible.

A. By focusing on the proximity of a firearm, and by relying on *inferences* of *potential* use rather than *evidence* of *actual* use, the court affirmed Bailey's conviction based on the "theoretical possibility" of use rather than on use itself. See *McFadden*, 13 F.3d at 468 (Breyer, C.J., dissenting). The "ordinary meaning" of

the word "use" "carries a more active meaning"; it "excludes simple (drug-crime-related) possession." *Id.* at 466-467. The "proximity" standard adopted by the opinion below violates that ordinary, active meaning of "use" by expanding it to include the possibility of future use "when needed to facilitate a drug crime." App., *infra*, 10a.

The opinion below states that a firearm kept in an accessible location is "used" because it can serve to protect the defendant, drugs, and drug proceeds. App., *infra*, 9a, 10a, 12a. But that rationale is necessarily too broad, if in fact Section 924(c)(1) does not reach mere possession, because it would apply "virtually whenever a gun is present near the scene of a drug crime." *McFadden*, 13 F.3d at 469 (Breyer, C.J., dissenting). Such a "possession for protection" theory sweeps all cases of mere possession within the ambit of "use" because all firearms -- even those that are only possessed -- have a potential utility. See *ibid.* (under the "possession for protection" theory, "possession of a gun (when related to a drug crime) *automatically* means a 'use'") (emphasis in original); see also *Sullivan*, 919 F.2d a 1432 & n.45 (rejecting the "possession for protection" rationale).

Furthermore, the "continuing nature" of the predicate drug offense of possession with intent to distribute cannot justify inferring past use of a firearm from present possession. *Clemis*, 11 F.3d at 602. Such a principle subsumes all cases of mere possession and permits conviction based on mere speculation of past use. The present case illustrates that problem. The prosecution

presented no evidence whatever that Bailey used the firearm in his trunk at any time in the past. Accordingly, the court relied on generalizations about the prevalence of gun usage in the drug world (App., *infra*, 12a) to conclude that past use could be inferred from Bailey's possession of a firearm at the time of arrest. Permitting one person to be convicted on the basis of assumptions about other persons' conduct demonstrates the limitless reach of the majority opinion's interpretation of "use."

The "emboldening" rationale approved by the majority (App., *infra*, 4a-5a) -- which holds that a firearm is "used" if the possessor was "emboldened" by the gun's existence -- suffers the same defect: it fails to separate use from possession. A jury could infer *in every case* that the possession of a gun somehow "enhance[d] the defendant's confidence." App., *infra*, 19a (Williams, J., joined by Silberman and Buckley, JJ., dissenting). Moreover, the "emboldening" theory invites juries and courts to speculate about whether a defendant was psychologically comforted by the existence of a gun, an inquiry that is incapable of consistent application and is impossible to review. Thus, the "emboldening" rationale promises either "a carte blanche for conviction" or a "continuous and vacillating review of jury verdicts." *Id.* at 20a.

The mercuric rationales advanced in the majority opinion point out the need for tangible guideposts for juries and courts to follow in separating the actual use of a gun from the "theoretical possibility" of use. The "active use" approach favored by Judges

Williams, Silberman, and Buckley -- and the alternate approach that looks to concrete indicia of use to support inference of "use" (such as proof of an actual drug transaction at which the gun played a role) -- both provide objective ways to distinguish use from mere possession. Such an approach is crucial for separating cases where it was "*likely* [that the defendant] put the gun to active use" from cases where use was merely a "theoretical possibility." *McFadden*, 13 F.3d at 468 (Breyer, C.J., dissenting) (emphasis in original).

B. The majority's "accessibility" test for determining whether a gun was used or carried "during and in relation to" a drug offense is also deeply flawed. The premise of the majority opinion is that any gun accessible to a drug offender "becomes a part of the drug activity and thus is used by the defendant in relation to the drug activity." App., *infra*, 10a. That rationale swallows every case in which a drug offender possesses a firearm, because the existence of the firearm would necessarily make it "a part of the drug activity." Thus, if a person who possessed drugs with the intent to sell them used a gun *at any time for any purpose*, that use could be imputed to the drug offense. Although this Court held in *Smith* that the phrase "in relation to" is to be read broadly (113 S. Ct. at 2058), the consequences of the "accessibility" test are too broad. See *Long*, 905 F.2d at 1578 n.10 (Thomas, J.) ("A person can possess a gun without either 'using' it or using it 'during and in relation to' a given crime.").

C. It is a cardinal principle of statutory interpretation that a statute must be read as a whole because "[t]he meaning of statutory language, plain or not, depends on context." *Brown* v. *Gardner*, 63 U.S.L.W. 4035, 4036 (U.S. Dec. 12 1994) (No. 93-1128) (quoting *King* v. *St. Vincent's Hospital*, 502 U.S. 215, 221 (1991)). Each term in a statute should be read in light of the surrounding words and provisions of the law as a whole, because that context illuminates the scope and meaning of each word within the statutory framework. *John Hancock Mutual Life Insurance Co.* v. *Harris Trust & Savings Bank*, 114 S. Ct. 517, 523 (1993). The broad interpretation of "use" by the court below violates those principles in two important respects.

1. The majority opinion's broad reading of "use" brings subsection (c)(1) of Section 924 into conflict with subsection (d). Subsection (c)(1) proscribes "use" of a firearm. By contrast, subsection (d) provides for forfeiture of firearms "used" in certain offenses *and* of firearms "intended to be used." Thus, Congress was "clearly quite alert to the distinction between firearms 'used' in commission of a crime and [firearms] merely 'intended' for such use." App., *infra*, 18a (Williams, J., joined by Silberman and Buckley, JJ., dissenting).

"It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *City of Chicago* v. *Environmental Defense Fund*, 114 S. Ct. 1588, 1593 (1994) (internal quotation marks omitted); *Brown*, 63 U.S.L.W. at 4037. Congress chose to

include an "intent to use" element in subsection (d) but not to include such an element in subsection (c)(1). The "proximity" test," however, reads a "floating intent to use" (App., *infra*, 16a (dissent)) into subsection (c)(1) by permitting a finding of "use" if a gun has merely been kept in an accessible place for potential use. *Id.* at 10a. Including within "use" the possibility of future retrieval and employment of a gun "effect[ively] dilute[s] 'use' to mean simple possession" and rewrites subsection (c)(1). *Id.* at 16a (dissent).

This Court has ruled that "using a firearm" should not have a "different meaning in § 924(c)(1) than it does in § 924(d)." *Smith*, 113 S. Ct. at 2057. Because subsection (d) distinguishes between "use" and the "intent to use," subsection (c)(1) should be construed to do so as well.

The court below offered no answer to this point made by Judge Williams' dissent. It is not clear what answer the court (or the government) *could* offer. The decision below, which ignores this critical point, is simply wrong.

2. The expansive definition of "use" in the opinion below also eclipses Section 924(c)(1)'s alternate element of "carrying" a firearm, and thus violates the tenet that each word in a statute must be given effect. *United States Department of Treasury* v. *Fabe*, 113 S. Ct. 2202, 2210 (1993). Although the court declined to address the scope of "use" *vis-à-vis* "carry," its "proximity" test leaves no room for the separate application of the "carrying" element. See App., *infra*, 18a (Williams, J., joined by Silberman

and Buckley, JJ., dissenting) (the proximity test "giv[es] 'use' such a broad meaning as to leave no apparent role for 'carry'").

The majority opinion's "proximity" test is so expansive that all conduct that constitutes "carrying" a firearm would also be covered by "use." The plain meaning of the term "carry" is "[t]o have or keep on one's person (*carry a gun*)." Webster's II New Riverside University Dictionary 233 (1984) (emphasis in original). But, under the majority opinion's "proximity" test, any gun that is carried is necessarily also "used" because a firearm on one's person is sufficiently proximate to be considered "used." Even if "carry" is interpreted more broadly to include situations where a defendant's cohorts bear weapons,[6] such situations would also constitute "use."[7]

The majority opinion's broad reading of "use" renders the alternate element of "carry" redundant; that failing strongly suggests that the interpretation is erroneous. *Ratzlaf* v. *United States*, 114 S. Ct. 655, 659 (1994) (concern against treating

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[6] See *e.g.*, *United States* v. *Harrison*, 931 F.2d 65, 71 (D.C. Cir.) (Thomas, J.) (Section 924(c)(1) conviction affirmed where defendant's confederates each bore weapons), cert. denied, 112 S. Ct. 408 (1991); see also App., *infra*, 20a (Williams, J., joined by Silberman and Buckley, JJ., dissenting). In the present case, there were no cohorts involved.

[7] Several courts of appeals have articulated a "within reach" standard for determining whether a firearm was "carried." See, *e.g.*, *United States* v. *Joseph*, 892 F.2d 118, 126 (D.C. Cir. 1989) (firearm "no more than an arm's span" from the defendant); *United States* v. *Gunning*, 984 F.2d 1476, 1483 (7th Cir. 1993) (gun taken in car to drug sale "within * * * reach"); *United States* v. *Nicholson*, 983 F.2d 983, 990 (10th Cir. 1993) (gun in car "within easy reach"); see also App., *infra*, 20a (Williams, J., joined by Silberman and Buckley, JJ., dissenting).

statutory terms as surplusage is "heightened when the words describe an element of a criminal offense"). See also *United States* v. *Granderson*, 114 S. Ct. 1259, 1265 (1994) (congressional intent to "get tough on drug offenders" does not provide guidance on how specific statutory provisions are to be interpreted).

D. The majority opinion's interpretation of Section 924(c)(1) is erroneous for the additional reason that it "swallow[s] up" the sentencing guideline that specifically addresses drug-related gun possession. See *McFadden*, 13 F.3d at 468 (Breyer, C.J., dissenting).

Section 924(c)(1) and Section 2D1.1(b)(1) of the Sentencing Guidelines both impose extra punishment on armed drug offenders. But, whereas Section 924(c)(1) prescribes a "blunt 'mandatory minimum' for 'us[ing]' a firearm, the "more sophisticated sentencing guideline" metes out a punishment that "varies with the seriousness of the drug crime" for situations where a "firearm * * * was possessed" during a drug offense. *Id.* at 466-467. The danger, then, of affording too much latitude to Section 924(c)(1) is that the mandatory minimum sentence will nullify the calibrated sentencing scheme promulgated under the Guidelines.

> In this instance, one relevant statute, the statute creating the Sentencing Guidelines, reflects a major congressional effort to create a fairly sophisticated * * * system that distinguishes among different kinds of criminal behavior and punishes accordingly. The other statute, the mandatory minimum statute, represents an ad hoc deviation from that more general policy. Given the importance (to Congress) of the Guidelines system, * * * *courts should take care not to interpret other statutes * * * with unnecessary breadth.*

Id. at 467-468 (emphasis added).

The D.C. Circuit's new interpretation of "use" in the opinion below takes no such care, and its "proximity" standard serves only to exacerbate the conflict with the Sentencing Guidelines. Such tension, moreover, is completely unnecessary: when the "use" requirement is governed by its "ordinary," "active" meaning (*McFadden*, 13 F.3d at 467 (dissent)), it complements rather than supplants the sentencing guideline penalizing "possession."

E. Finally, the opinion below runs roughshod over the rule of lenity. As this Court observed last Term, "where text, structure, and history fail to establish that the Government's position is unambiguously correct[,] we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor." *United States* v. *Granderson*, 114 S. Ct. at 1267. Whatever else may be said of the government's position and of the position adopted by a bare majority of the court below, it would be farcical to claim that the position is "unambiguously correct." The court below did not so claim; rather, it simply chose to ignore the rule of lenity. But the rule of lenity has a role to play in these difficult Section 924(c)(1) cases, and this Court should grant review and apply the rule of lenity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1994

APPENDICES

UNITED STATES of America

v.

Roland J. BAILEY, Appellant.

UNITED STATES of America

v.

Candisha Summerita ROBINSON a/k/a Candysha Robinson, Appellant.

Nos. 90-3119, 92-3062.

United States Court of Appeals, District of Columbia Circuit.

Argued In Banc March 30, 1994.

Decided Oct. 4, 1994.

Defendants were separately convicted in the United States District Court for the District of Columbia, Stanley S. Harris and Aubrey E. Robinson, Jr., JJ., of drug offenses, and they appealed. Different panels of the Court of Appeals affirmed, 995 F.2d 1113, and reversed, 997 F.2d 884, defendants' respective convictions of use of firearm during and in relation to drug-trafficking crime. Cases were consolidated for en banc reconsideration. The Court of Appeals, Ginsburg, Circuit Judge, held that: (1) sufficiency of evidence test henceforth would be whether there is evidence that firearm in question was in proximity to drugs, drug paraphernalia, or drug proceeds and was accessible to defendant from site of drugs, drug paraphernalia, or drug proceeds involved in predicate drug-trafficking offense, and (2) evidence was sufficient to support both defendants' convictions.

Affirmed.

Wald, Circuit Judge, filed dissenting opinion.

Stephen F. Williams, Circuit Judge, filed dissenting opinion, in which Silberman and Buckley, Circuit Judges, joined.

Silberman, Circuit Judge, filed separate dissenting opinion.

1. Weapons ⇐4, 6

Mere possession of firearm by someone who commits drug offense does not amount to offense of using or carrying firearm in relation to drug-trafficking crime; instead, firearm must have some purpose or effect with respect to drug-trafficking crime. 18 U.S.C.A. § 924(c)(1).

2. Courts ⇐89

Due regard for value of stability in law requires court to have good and sufficient reason to reject established law at later date.

3. Courts ⇐90(4)

Court reconsiders its own prior construction of statute somewhat gingerly because, unlike in context of constitutional interpretation, Congress remains free to alter what court has done.

4. Weapons ⇐4

Rejection of established circuit precedent creating multifactor, open-ended test for determining whether firearm was used in relation to drug-trafficking crime was warranted by fact that established test impermissibly intruded into province of jury, produced widely divergent and seemingly contradictory results, and conflicted with standards adopted in other circuits. 18 U.S.C.A. § 924(c)(1).

5. Criminal Law ⇐1144.13(5)

On appeal from general verdict finding defendant guilty, deference owed to trier of fact requires reviewing court to draw from record all inferences that can justifiably be drawn in support of conviction.

6. Weapons ⇐17(5)

Whether gun was used during and in relation to drug-trafficking offense is question of fact to be settled by trier of fact, who would be accorded deference on appeal. 18 U.S.C.A. § 924(c)(1).

7. Weapons ⇐4

Defendant "uses" gun, for purposes of offense of using firearm during and in relation to drug-trafficking crime, whenever defendant puts or keeps gun in particular place from which defendant or defendant's agent can get access to it if and when needed to

facilitate drug crime. 18 U.S.C.A. § 924(c)(1).

See publication Words and Phrases for other judicial constructions and definitions.

8. Weapons ⇐4

In case where predicate offense involves distribution of drugs, government must show that defendant had gun in such place at time that drugs were being distributed to establish that defendant "used" gun during and in relation to offense. 18 U.S.C.A. § 924(c)(1).

See publication Words and Phrases for other judicial constructions and definitions.

9. Weapons ⇐4

In case where predicate offense is possession with intent to distribute drugs, government need not prove that gun was in that place during entire period that defendant illegally possessed drugs or that it was in that place at time that defendant was arrested, to establish that defendant "used" gun during and in relation to predicate offense; because possession with intent to distribute is continuing offense, government need prove only that defendant put or kept gun in that place at some point while defendant illegally possessed drugs. 18 U.S.C.A. § 924(c)(1).

10. Weapons ⇐4

Using gun to protect one's drugs, drug paraphernalia, or proceeds of one's drug sales is clearly prohibited use of gun, for purposes of offense of using firearm in relation to drug-trafficking crime. 18 U.S.C.A. § 924(c)(1).

11. Weapons ⇐4

Positioning firearm in such a way that it protects or is otherwise integrated into one's drug trafficking amounts to use of gun in relation to drug-trafficking offense. 18 U.S.C.A. § 924(c)(1).

12. Weapons ⇐17(2)

Whenever there is sufficient evidence for jury to find that defendant at some time during commission of predicate drug offense put or kept firearm in place where it would be proximate to and accessible from place that is clearly connected to his drug trafficking, jury may also infer that gun was being used to protect drug-trafficking operation, and was therefore being used in relation to drug-trafficking offense; jury may draw this inference regardless of whether predicate offense is one of drug distribution or possession with intent to distribute drugs. 18 U.S.C.A. § 924(c)(1).

13. Weapons ⇐17(4)

Evidence that at time of arrest loaded pistol was found in trunk of defendant's car along with $3,216 in cash, and that 30 grams of cocaine was located elsewhere in car, supported jury's conclusion that defendant used gun during and in relation to drug-trafficking crime. 18 U.S.C.A. § 924(c)(1).

14. Weapons ⇐17(4)

Evidence that firearm was found in locked trunk that also contained drugs underlying defendant's conviction for possession with intent to distribute supported jury's finding that defendant used gun during and in relation to drug-trafficking crime. 18 U.S.C.A. § 924(c)(1).

15. Weapons ⇐17(4)

To survive challenge to sufficiency of evidence to support conviction for using firearm in relation to drug-trafficking crime, government need only point to evidence that firearm in question was in proximity to drugs, drug paraphernalia, or drug proceeds and was accessible to defendant from site of drugs, drug paraphernalia, or drug proceeds involved in his or her predicate drug-trafficking offense. 18 U.S.C.A. § 924(c)(1).

Appeal from the United States District Court for the District of Columbia (CR-89-00310-01, CR-91-00453-01).

James G. Duncan (appointed by the court) argued the cause and filed the briefs, for appellant Bailey.

David B. Smith (appointed by the court) argued the cause and filed the briefs, for appellant Robinson.

John R. Fisher, Asst. U.S. Atty., argued the cause for appellee. With him on the brief were Eric H. Holder, Jr., U.S. Atty., and Elizabeth H. Danello, Asst. U.S. Atty., Elizabeth Trosman, Odessa F. Vincent, Thomas C. Black, and William E. Lawler, III, Asst. U.S. Attys., entered appearances.

Before EDWARDS, Chief Judge, WALD, MIKVA,* SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, and RANDOLPH, Circuit Judges.

Opinion for the Court filed by Circuit Judge GINSBURG.

Dissenting opinion filed by Circuit Judge WALD.

Dissenting opinion filed by Circuit Judge STEPHEN F. WILLIAMS, in which Circuit Judges SILBERMAN and BUCKLEY concur.

Separate dissenting statement filed by Circuit Judge SILBERMAN.

GINSBURG, Circuit Judge:

This consolidated case involves two separate challenges, one by appellant Roland Bailey and one by appellant Candisha Robinson, to their convictions under 18 U.S.C. § 924(c)(1). In relevant part, that section imposes a five-year term of imprisonment upon anyone who "during and in relation to any crime of violence or drug trafficking crime ... uses or carries a firearm." We have long required that in order to support a conviction under § 924(c)(1), the government must demonstrate both a "nexus ... between a particular drug offender and the firearm," *United States v. Long*, 905 F.2d 1572, 1577 (D.C.Cir.1990), and that "the gun facilitate[d] the predicate offense in some way," *United States v. Jefferson*, 974 F.2d 201, 205 (D.C.Cir.1992). In order to assess whether the government has made the required showing, we have developed an open-ended test that takes account of numerous factors arguably relevant to whether a gun was used in relation to a drug trafficking offense. *See, e.g., United States v. Derr*, 990 F.2d 1330, 1338 (D.C.Cir.1993); *United States v. Morris*, 977 F.2d 617, 621-22 (D.C.Cir.1992). Applying this test, divided panels of the court affirmed Bailey's conviction, *see United States v. Bailey*, 995 F.2d 1113 (D.C.Cir. 1993), and reversed Robinson's conviction, *see United States v. Robinson*, 997 F.2d 884 (D.C.Cir.1993).

Because this complex, open-ended test has produced widely divergent results and because we believe that it intrudes the court into the province of the jury, we now replace it with a test that looks to two factors only: the proximity of the gun to the drugs involved in the underlying offense, and the accessibility of the gun to the defendant from the place where the drugs, drug paraphernalia, or drug proceeds are located. Applying that test, we affirm both convictions.

I. Background

In each of these cases, possession with the intent to distribute cocaine was the predicate drug offense in connection with which the defendant was charged with using or carrying a firearm in violation of § 924(c)(1). The facts of each case are briefly as follows.

A. United States v. Bailey

In May 1989, Roland Bailey was stopped by two Metropolitan Police officers after they noticed that the car he was driving had no front license plate and no inspection sticker. When Bailey failed to produce a driver's license, the officers ordered him out of the car. Before Bailey exited the car, the officers saw him push something between the seat and the front console. Upon searching the passenger compartment of the car they discovered one round of ammunition and 27 small plastic bags containing a total of 30 grams of cocaine. The officers then placed Bailey under arrest; the ensuing search of the trunk of his car turned up a loaded 9-mm. pistol and $3,216 in cash.

Bailey was charged with one drug offense and one other firearms offense in addition to using or carrying a firearm in violation of 18 U.S.C. § 924(c)(1). At trial, Detective Charles DiDomenico, a narcotics expert, tes-

* Then-*Chief Judge* Mikva, a member of the Court when these cases were argued *in banc*, took no part in the disposition.

tified that weapons such as Bailey's are frequently carried by drug dealers "not only to protect themselves, but [also] to protect their assets, drugs and money." Bailey was convicted by the jury on all charges and was sentenced by the court to two concurrent 51-month sentences of imprisonment on the drug and weapon charges not at issue here, and to a consecutive 60-month term of imprisonment on the § 924(c)(1) conviction.

B. United States v. Robinson

In June 1991, an undercover officer of the Metropolitan Police Department approached Veloria Robinson, the sister of appellant Candisha Robinson, and told her that he wanted to buy crack cocaine. Veloria then took him to an apartment in the northeast quadrant of the city. Candisha opened the door; Veloria told her that the officer wanted something. When Candisha asked what he wanted, he replied that he wanted a "twenty." He then entered the apartment and the Robinson sisters went into the bedroom. He saw Candisha hand Veloria a rock of crack cocaine, which Veloria then sold to him. The next evening, the officer made another controlled buy at the same apartment, this time from a man who claimed that he also lived there.

Shortly after the second controlled buy, a search warrant was executed at the apartment. Inside a locked trunk in the bedroom closet the police found a .22-caliber Derringer, appellant Robinson's 1990 tax return, a letter from her employer, 10.88 grams of crack cocaine, and the marked $20 bill from the first controlled buy. They also found a quantity of plastic baggies in the bedroom.

At trial, Detective David Stroud, a narcotics expert, testified that the Derringer was a "second gun"—that is, a type of gun that a drug dealer might hide on his person for use until he could get to his "real gun." Stroud also testified that drug dealers generally use guns to protect themselves from other drug dealers, the police, and their own employees.

Robinson was convicted by a jury on five separate drug counts as well as on the § 924(c)(1) charge. Including the 60-month term of imprisonment for violating § 924(c)(1), she was sentenced to 157 months of imprisonment, four years of supervised release, and a special assessment of $300.

C. The Appeals in Bailey and Robinson

Each defendant appealed his or her § 924(c)(1) conviction on the ground that the Government had failed to adduce sufficient evidence at trial that he or she had "used" or "carried" a firearm in relation to a drug offense. Different panels affirmed Bailey's conviction and reversed Robinson's, in each case over a dissent. Bailey and the government respectively suggested rehearing *in banc*. In order to resolve the apparent inconsistencies in our various decisions applying § 924(c), we consolidated the two cases and reheard them *in banc*.

II. Analysis

[1] Section 924(c)(1) states that:

> Whoever, during and in relation to any ... drug trafficking crime ... uses or carries a firearm, shall, in addition to the punishment for such ... drug trafficking crime, be sentenced to imprisonment for five years.

By requiring that the use of the firearm be "in relation to" a drug trafficking offense, the Congress made it clear that it did not intend to criminalize the mere possession of a firearm by someone who commits a drug offense. "[T]he firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." *Smith v. United States*, — U.S. —, — — —, 113 S.Ct. 2050, 2058–59, 124 L.Ed.2d 138 (1993). At the same time, it is clear that a firearm need not actually be brandished in order to be used or carried in connection with a drug trafficking offense. *United States v. Evans*, 888 F.2d 891, 896 (D.C.Cir.1989). As Justice (then Judge) Kennedy wrote for the Ninth Circuit in the seminal opinion on § 924(c)(1):

> If the firearm is within the possession or control of a person who commits an underlying crime as defined by the statute, and the circumstances of the case show that the firearm facilitated or had a role in the crime, such as emboldening an actor who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others, whether or not such display or discharge occurred, then there is a violation of [the statute].

United States v. Stewart, 779 F.2d 538, 540 (9th Cir.1985) (internal citations omitted).

A. Section 924(c)(1) to Date

In an effort to distinguish between mere possession of and the use or carrying of a gun in connection with a drug trafficking crime, we held early on that more than just evidence of proximity was required to establish "that the gun supported the possession crime." *United States v. Bruce*, 939 F.2d 1053, 1055 (D.C.Cir.1991). By the next year, we were able to state that "a number of factors" may be relevant in any particular case: "courts have identified and will [continue to] identify" such factors. *United States v. Morris*, 977 F.2d 617, 621 (D.C.Cir.1992). Just two years later Judge Wald summarized the development of our case law this way:

> [W]e have enumerated a nonexclusive set of factors to weigh in making that [distinction]. Among other things, we look to whether a gun is accessible to the defendant, whether it is located in proximity to the drugs (which may cut either way depending on the facts of a particular case), whether it is loaded, what type of weapon it is, and, finally, whether there is expert testimony to bolster the government's particular theory of "use."

Derr, 990 F.2d at 1338 (citing *Morris*, 977 F.2d at 621–22). Thus, in each case in which a defendant challenges the sufficiency of the evidence for his conviction under § 924(c)(1), we have weighed each bit of evidence against him in order to determine whether the defendant could be said to have used (or carried) his gun in furtherance of his drug crime.

Defendants Bailey and Robinson do not attack this open-ended (for convenience *Bruce–Morris–Derr*) approach in determining whether a gun was used during and in relation to a drug trafficking offense. Nor do they question the prior holding of this (and other) court(s) that a gun need not be brandished or displayed in order to be used or carried. Instead, each argues that if this approach were properly applied, he or she could not have been convicted based upon the evidence presented at trial. In response, the government argues that it needs to present evidence only that the defendant possessed a firearm and that the firearm in some way facilitated the drug crime; thus implicitly the Government asks us to abandon the *Bruce–Morris–Derr* approach in favor of a simpler test.

In form the dispute between the parties is little more than a disagreement over the evidence necessary to sustain a § 924(c)(1) conviction; neither side expressly addresses the question of how the disputed element of the crime, *viz.* "use," ought be defined. In substance, however, this case is about what constitutes use, as opposed to mere possession, of a firearm. Only when we have resolved that question can we determine the quantum of evidence necessary to convict and formulate an appropriate test for assessing whether the government has produced that evidence.

[2, 3] We granted rehearing in order to revisit these issues in the light of our experience using the *Bruce–Morris–Derr* approach. We do so bearing in mind that because the *Bruce–Morris–Derr* approach represents the established law of the circuit, a due regard for the value of stability in the law requires that we have good and sufficient reason to reject it at this late date. *See McKinney v. Pate*, 20 F.3d 1550, 1565 n. 21 (11th Cir.1994) (*in banc*) (noting that although "the implications of *stare decisis* are less weighty" when an *in banc* court reviews an issue for the first time, "*stare decisis* is a hallmark of our judicial system" and should still be considered by the court *in banc*). In particular, we reconsider our own prior construction of a statute somewhat gingerly as well because " 'unlike in the context of constitutional interpretation ... Congress remains free to alter what we have done.' " *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 875 (D.C.Cir.1992) (*in banc*) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73, 109 S.Ct. 2363, 2370, 105 L.Ed.2d 132 (1989) (internal citations omitted)); *see also Cottrell v. Commissioner*, 628 F.2d 1127, 1131 (8th Cir.1980) (*in banc*) ("The doctrine of *stare decisis*, weighty in

any context, is especially so in matters of statutory construction.").

We have nonetheless identified at least three factors that justify rejecting established precedent. First, the *in banc* court may properly overrule a prior panel decision if "it decides that the panel's holding on an important question of law was fundamentally flawed." *Critical Mass Energy Project*, 975 F.2d at 876. In this regard, we conclude below that the open-ended *Bruce–Morris–Derr* approach impermissibly intrudes into the province of the jury. Second, when "a precedent [is] a positive detriment to coherence and consistency in the law ... because of inherent confusion created by an unworkable decision," the court is justified in overruling that precedent. *Patterson*, 491 U.S. at 173, 109 S.Ct. at 2371. In this case, even a brief survey of our decisions demonstrates (below) that the *Bruce–Morris–Derr* approach has produced and will likely continue to produce inconsistent results. Finally, the *in banc* court may overrule a prior precedent interpreting a statute "if it finds that other circuits have persuasively argued a contrary construction." *Critical Mass Energy Project*, 975 F.2d at 876. Again, a survey of the other circuits (also below) demonstrates that they have uniformly adopted a standard different from ours and one that seems more conducive to consistent application.

[4] Preliminarily, therefore, we survey the problems inherent in the *Bruce–Morris–Derr* approach: intrusion into the province of the factfinder, seemingly inconsistent results, and a continuing conflict with the interpretation of § 924(c)(1) adopted by virtually every other circuit.

1. The Province of the Jury

[5] It is a cardinal principle of our system of criminal law that the facts are settled by the trier of fact, be it a jury or a judge, and are not ordinarily to be redetermined by a reviewing court. On appeal from a general verdict finding a defendant guilty, the deference we owe to the trier of fact requires that we draw from the record all inferences that can justifiably be drawn in support of the conviction. Hence, in assessing the sufficiency of the evidence, as an appellate court we must ask not "whether [we] believe[ ] that the evidence at the trial established guilt beyond a reasonable doubt, but whether the judgment was supported by substantial evidence." *Woodby v. Immigration & Naturalization Service*, 385 U.S. 276, 282, 87 S.Ct. 483, 486, 17 L.Ed.2d 362 (1966). Or, as the Supreme Court said in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979), "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319, 99 S.Ct. at 2789 (emphasis in original); *see also United States v. Long*, 905 F.2d 1572, 1576 (D.C.Cir. 1990) ("A jury is entitled to draw a vast range of reasonable inferences from evidence, but may not base a verdict on mere speculation").

[6] Whether a gun was used during and in relation to a drug trafficking offense is, at its core, a question of fact. In a case where the gun was not actually fired or brandished during the commission of the crime, it may well be an ultimate rather than a basic fact, but it is still a question of fact and not of law. Of course, an appellate court may properly determine, as a matter of law, the baseline or minimum conduct that can constitute a "use," and it must determine in each case, with appropriate deference to the jury, whether the record contains sufficient evidence of such conduct. The reviewing court does not sit, however, to make its own finding with respect to an ultimate fact. Weighing the evidence is a function assigned to the jury: "We are not a second jury weighing the evidence anew and deciding whether or not we would vote to convict the defendant." *United States v. Poston*, 902 F.2d 90, 94 (D.C.Cir.1990). Yet the use of an approach that requires the court to weigh numerous factors and to determine the specific relevance of individual facts in order to assess the sufficiency of the evidence invites the court to do just that.

The *Bruce–Morris–Derr* approach strips from the jury its "responsibility [as] the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw

reasonable inferences from basic facts to ultimate facts." *Jackson*, 307 U.S. at 319, 99 S.Ct. at 2789. For example, in *United States v. Bruce*, 939 F.2d 1053 (D.C.Cir.1991), we were at considerable pains to determine whether a small gun found in the pocket of a coat along with a stash of drugs "was intended for use only at the time of distribution" or was rather "the sort of weapon a drug dealer would employ for protection against an effort to penetrate a crack house." *Id.* at 1055. Determining that the former was more likely true, we reversed the conviction. *See id.* at 1056. Similarly, in *Derr* and *Robinson*, the panel struggled to determine for itself the significance of the fact that the defendant's gun was locked respectively in a closet or trunk with a stash of drugs at the time of the defendant's arrest. *See Robinson*, 997 F.2d at 888; *Derr*, 990 F.2d at 1338. Determining the weight to be given a single piece of evidence is not ordinarily an appropriate function for an appellate court.

A due regard for the limits that the jury system necessarily places upon the scope of our review would not lead us to abdicate all our responsibility as an appellate court—for example by affirming any conviction in which a gun is found and there is some connection, no matter how speculative or remote, between the gun and the predicate drug offense. A jury may convict a defendant for any of a number of impermissible reasons, and therefore, if the defendant claims that the evidence against him is insufficient to sustain his conviction, we must as an appellate court review the record conscientiously. *See United States v. Zeigler*, 994 F.2d 845, 849 (D.C.Cir.1993). Nor does our recognition that the approach heretofore used in this circuit impinges upon the province of the jury by itself predetermine precisely how we ought to review a § 924(c)(1) case. It does, however, strongly suggest that we must replace the open-ended *Bruce–Morris–Derr* approach with a manageable standard; we must, that is, state clearly the minimum showing that the government must make in order to put to the jury the question whether a defendant has violated § 924(c)(1).

2. Inconsistent Results

The open-ended approach described in *Derr* has produced widely divergent and seemingly contradictory results. Panels have upheld convictions where a loaded, sawed-off shotgun was found along with crack cocaine and drug paraphernalia in a lawn clipping bag beneath the exterior stairwell of a house and additional drugs and paraphernalia were found in the defendant's bedroom, *see United States v. Jefferson*, 974 F.2d 201 (D.C.Cir.1992); where loaded pistols were found underneath a sofa cushion and on a bedroom nightstand in the defendant's house, which elsewhere contained crack cocaine in ziplock bags and other drug paraphernalia, *see United States v. Morris*, 977 F.2d 617 (D.C.Cir.1992); and where a loaded 9–mm. pistol was found along with cash in the trunk of the defendant's car after bags of cocaine had been found in the front seat of the car, *see United States v. Bailey*, 995 F.2d 1113 (D.C.Cir.1993). In contrast, panels have reversed convictions where a loaded .22 caliber Derringer was found, along with individual packages of cocaine and marijuana, in a pocket of the defendant's trench coat in the house in which he lived, *see United States v. Bruce*, 939 F.2d 1053 (D.C.Cir.1991); where an unloaded .357 Magnum revolver was found along with the defendant's birth certificate and a locked box containing cash, crack cocaine, and drug paraphernalia in an apartment in which the defendant was staying, *see United States v. Derr*, 990 F.2d 1330 (D.C.Cir.1993); and where an unloaded .22 caliber Derringer was found in a closet along with crack cocaine and drug proceeds, including marked money, *see United States v. Robinson*, 997 F.2d 884 (D.C.Cir.1993). Although each of these cases can be distinguished on the basis of one or another fact—for example, by looking to the type of gun involved or to how easily the defendant could have grabbed the gun at the time that he was arrested—such distinctions seem counter-intuitive if not arbitrary. Having reflected upon our experience, we think it apparent that the court has failed to take a consistent approach because it has not laid down a standard that yields determinate results in any but the easiest of cases.

3. Conflict with Other Circuits

No other circuit has found our open-ended approach persuasive. Our sister circuits have each adopted a definition of "use" that is considerably broader than firing, displaying, or otherwise brandishing the firearm. They focus upon whether the evidence concerning the location of the gun is sufficient to permit the jury to conclude that the gun in some way facilitated the predicate drug trafficking offense. From a functional perspective, the standards they have developed for assessing the sufficiency of the evidence are much more similar to the "proximity and accessibility" standard we adopt today than to the open-ended approach that we have used in the past.

The opinion in *United States v. Molinar-Apodaca*, 889 F.2d 1417 (5th Cir.1989) is representative. In that case, police officers executing a search warrant had found a commercial quantity of marijuana in a shed outside the defendant's house; in the house itself, they found an automatic rifle and a semi-automatic handgun. *Id.* at 1422. In analyzing the defendant's challenge to the sufficiency of this evidence, the Fifth Circuit did not look at such details as whether the guns were loaded or whether they were the appropriate type of weapon to protect an ongoing drug operation. Rather, applying circuit law to the effect "that the government is only obliged to show that the firearm was available to provide protection to the defendant in connection with his engagement in drug trafficking," the court affirmed the conviction.

In the wake of Justice Kennedy's analysis in *Stewart*, the Ninth Circuit applies an equally straightforward test. That court will affirm a conviction under § 924(c)(1) "if [the firearm's] physical proximity to the defendant at any time during the commission of the crime, or during arrest, supports the inference that it emboldened him to commit the underlying offense or to resist arrest." *United States v. Torres-Medina*, 935 F.2d 1047, 1050 (9th Cir.1991).

Every other circuit similarly focuses, in essence, upon whether the firearm was accessible and proximate to the defendant during the commission of the drug offense. In numerical order by circuit, *see, e.g., United States v. Paulino*, 13 F.3d 20, 26 (1st Cir. 1994) ("[T]he court's critical concern should ... be whether ... [the firearm] was 'available for use' in connection with the narcotics trade"); *United States v. Medina*, 944 F.2d 60, 66 (2d Cir.1991) (holding that a conviction may be affirmed "where circumstances indicate that the defendant intended to use the weapon by strategically placing it so that it could be available for use during a drug transaction"); *United States v. Hill*, 967 F.2d 902, 906–07 (3d Cir.1992) (holding that where the proximity of the gun to the drugs indicated that the defendant's "access to the weapon was unimpeded by distance or other objects," the jury could conclude that the weapon "facilitated [the defendant's] possession of and intention to distribute" illegal drugs); *United States v. Paz*, 927 F.2d 176, 179 (4th Cir. 1991) (affirming a conviction because, during the course of defendant's possessory offenses, "the gun was present and accessible, even though under a mattress"); *United States v. Thomas*, 12 F.3d 1350, 1362 (5th Cir.1994) ("The presence of firearms at the home of a defendant where drugs, money, and ammunition are also found ... is sufficient to establish the 'use' of a firearm as an integral part of a drug-trafficking crime in violation of § 924(c)(1)"); *United States v. Warner*, 10 F.3d 1236, 1239 (6th Cir.1993) (affirming a conviction solely because the firearm was "readily accessible for drug-related protection"); *United States v. Vasquez*, 909 F.2d 235, 240 (7th Cir.1990) (holding that a conviction under § 924(c)(1) is appropriate when guns and drugs are present in the same location, because the "trier of fact [can] reasonably conclude that the availability of firearms instills [in the defendant] a heightened sense of security [while] he posses[es] the drugs with the intent to distribute them"); *United States v. Quintanilla*, 25 F.3d 694, 700 (8th Cir.1994) ("To support a conviction under section 924(c)(1), the government need only establish that a firearm was present and available for use"); *United States v. Torres-Medina*, 935 F.2d 1047, 1050 (9th Cir.1991) ("We hold that a firearm may be considered available [and therefore used by a defendant] for purposes of section

924(c)(1) if its physical proximity to the defendant at any time during the commission of the crime, or during arrest, supports the inference that it emboldened him to commit the underlying offense or to resist arrest"); *United States v. McKinnell*, 888 F.2d 669, 675 (10th Cir.1989) (holding that "the uses element of section 924(c)(1) is satisfied when the defendant has ready access to the firearm and the firearm was an integral part of his criminal undertaking and its availability increased the likelihood that the criminal undertaking would succeed" (internal quotation marks omitted)); *United States v. Poole*, 878 F.2d 1389, 1393 (11th Cir.1989) ("[P]ossession of a firearm constitutes use in relation to the drug trafficking offense if the possession is an integral part of, and facilitates the commission of, the drug trafficking offense"); *see also* Note, *Smith v. United States and the Modern Interpretation of 18 U.S.C. 924(c)(1): A Proposal to Amend the Federal Armed Offender Statute*, 69 NOTRE DAME L.REV. 815, 843 & nn. 187–190 (1994) (noting that "other circuits have specifically rejected many of the factors considered by the D.C.Circuit: size of the gun ... whether the firearm was loaded, number of weapons, and evidence of past actual use"). *But cf. United States v. Taylor*, 18 F.3d 55, 58 (2d Cir.1994) (noting that the analysis of a sufficiency challenge "is clearly a very fact-intensive question [that] requir[es] a careful examination of, among other things, where the gun was located and what else was found in the apartment").

B. Section 924(c) Henceforth

As the Supreme Court has made clear, the government must make two distinct showings in order to obtain a conviction under § 924(c)(1): "that the defendant 'use[d] or carrie[d] a firearm' " and "that the use or carrying was 'during and in relation to' " a predicate offense. *Smith v. United States*, — U.S. —, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993). Therefore, in determining what the proper standard should be, we must determine both what constitutes the use or carrying of a gun and in what circumstances such a use or carrying is in relation to a drug trafficking offense.

1. "Use" of a Firearm

In the context of § 924(c)(1), "use" could be defined either narrowly, so as to encompass only the paradigmatic uses of a gun, i.e., firing, brandishing, or displaying the gun during the commission of the predicate offense, or more broadly, so as to include the other ways in which a gun can be used to facilitate drug trafficking. The narrow definition has the virtue of simplicity; it is, after all, relatively easy to determine whether the defendant's firing, brandishing, or displaying a gun was related to the defendant's contemporaneous (recall the "during" requirement of § 924(c)(1)) drug trafficking offense. The narrow definition also has the vice of simplicity, however; it is too narrow to capture all of the various uses of a firearm that the Congress apparently intended to reach via § 924(c)(1).

Certainly nothing in the statute indicates that the Congress intended to exclude any use from the scope of its prohibition. Indeed, the Supreme Court has said that in § 924(c)(1), the "Congress employed the term 'use' expansively." *See Smith*, — U.S. at —, 113 S.Ct. at 2058. Wherefore, it held that the statute prohibits the "use" of a firearm even as an object that can be bartered for drugs. *See Smith*, — U.S. at —, —, 113 S.Ct. at 2055, 2057.

Like firing, brandishing, or displaying a gun, barter involves handling the gun. A gun can surely be used even when it is not being handled, however. For example, a gun placed in a drawer beside one's bed for fear of an intruder would, in common parlance, be a gun "used" for domestic protection.

This more inclusive understanding of "use" has long been recognized in the jurisprudence of the Supreme Court. In *Astor v. Merritt*, 111 U.S. 202, 4 S.Ct. 413, 28 L.Ed. 401 (1884), the Court was required to interpret a customs statute that exempted from duty "[w]earing apparel in actual use ... of persons arriving in the United States." *Id.* at 203, 4 S.Ct. at 413. The petitioner sought an exemption for clothing that he and his family had purchased abroad, but not yet worn. The Court accepted his argument:

> If a person residing in the United States should purchase wearing apparel here, in a

condition ready for immediate wear without further manufacture, intended for his own use or wear, suitable for the immediately approaching season of the year, and not exceeding in quantity, quality or value the limit above mentioned, no one would hesitate to say that such wearing apparel was 'in actual use' by such person, even though some of it might not have been actually put on or applied to its proper personal use.... An article of wearing apparel, bought for use, and appropriated and set apart to be used, by being placed in with, and as a part of, what is called a person's wardrobe, is, in common parlance, in use, in actual use, in present use, in real use, as well before it is worn as while it is being worn or afterwards.

Id. at 213, 4 S.Ct. at 419. Likewise, in *Smith*, the Court noted with approval the following definition of the verb "to use": " '[t]o make use of; to convert to one's service; to avail oneself of; to utilize; to carry out a purpose or action by means of.' " *Id.* — U.S. at ——, 113 S.Ct. at 2054 (quoting BLACK'S LAW DICTIONARY 1541 (6th ed. 1990)).

[7-9] In the context of § 924(c)(1), therefore, we hold that one uses a gun, i.e., avails oneself of a gun, and therefore violates the statute, whenever one puts or keeps the gun in a particular place from which one (or one's agent) can gain access to it if and when needed to facilitate a drug crime. In a case where the predicate offense involves the distribution of drugs, the government must show that the defendant had the gun in such a place at the time that the drugs were being distributed. In a case when the predicate offense is possession with the intent to distribute drugs, however, the government need not prove that the gun was in that place during the entire period that the defendant illegally possessed the drugs or that it was in that place at the time that the defendant was arrested. Because possession with the intent to distribute is a continuing offense—that is, an offense that extends through time—the government need only prove that the defendant put or kept the gun in that place at some point while the defendant illegally possessed the drugs.[1]

2. "During" and "In Relation To"

[10] Once it is determined that the defendant has used or carried a gun, the more difficult question is whether he has done so "in relation to a drug trafficking offense." As the Court noted in *Smith*, this requirement "at a minimum, means that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." — U.S. at ——, 113 S.Ct. at 2059. For the statute to be violated, therefore, the gun "must 'facilitat[e] or ha[ve] the potential of facilitating' the drug trafficking offense." *Id.* (quoting *Stewart*, 779 F.2d at 540) (alterations in original). Using a gun to protect one's drugs, drug paraphernalia, or the proceeds of one's drug sales is therefore clearly a prohibited use of the gun. Our prior decisions under § 924(c)(1) recognize as much.

The First Circuit refers to this relationship quite generally as a "facilitative nexus." That court looks only to whether the gun was "kept [where it was] to be available for use" in an ongoing drug offense. *See, e.g., United States v. Paulino*, 13 F.3d 20, 26 (1st Cir. 1994). The court's rationale is readily explained: once a person acquires a firearm and puts or keeps it where it can be used more actively in his drug activity, that firearm becomes a part of the drug activity and thus is used by the defendant in relation to the drug activity. It matters little whether the use is described in terms of emboldening

1. Invoking *United States v. Ray*, 21 F.3d 1134 (D.C.Cir.1994), and the Solicitor General's brief in *McLaughlin v. United States*, 476 U.S. 16, 106 S.Ct. 1677, 90 L.Ed.2d 15 (1986), the dissent proposes that one may "use" a firearm in connection with a drug trafficking offense only by displaying it or, if the weapon is concealed, by threatening to use it. Judge Williams' Dissenting Opinion pp. 123 - 25. This ignores that how one "uses" a weapon in a crime necessarily depends upon the nature of the crime. *Ray* and *McLaughlin* were aggravated bank robbery cases, interpreting 18 U.S.C. § 2113(d). Of course one must somehow threaten another with a dangerous weapon in order to commit that offense. But it is senseless to say the same of crimes involving possession of drugs. Those are furtive crimes. Stealth is essential to their success. If, as expected, the drugs are secreted, one should expect the firearm to be as well.

the defendant to commit the drug trafficking crime, *see, e.g., Stewart*, 779 F.2d at 540, protecting the defendant's possessory interest in his drugs, *see, e.g., United States v. Young-Bey*, 893 F.2d 178, 181 (8th Cir.1990), or otherwise; any way one puts it, the firearm is being used as part of the drug activity. Therefore, like the First Circuit, we look to whether the gun was positioned so as to be available for use during ongoing drug activity in order to determine whether the use was within the scope of § 924(c)(1).

Note that in order to relate to a drug trafficking offense, the use of the gun need not actually have furthered the offense. As the Supreme Court said in *Smith*, the gun need only "[a]ve] the potential of facilitating" the drug trafficking offense. Indeed, the Supreme Court has consistently held that "[t]he ordinary meaning of the words ['relating to'] is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.' " *Morales v. Trans World Airlines, Inc.*, — U.S. ——, ——, 112 S.Ct. 2031, 2037, 119 L.Ed.2d 157 (1992) (quoting BLACK'S LAW DICTIONARY 1158 (5th ed. 1979)); *see also District of Columbia v. Greater Washington Board of Trade*, — U.S. ——, ——, 113 S.Ct. 580, 583, 121 L.Ed.2d 513 (1992) (noting that when the Congress uses the phrase "relates to," it has chosen " 'deliberately expansive' language" (quoting *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 47, 107 S.Ct. 1549, 1552, 95 L.Ed.2d 39 (1987))). The Congress's use of that phrase here was clearly deliberate and an indication that it intended § 924(c)(1) to be a broad prohibition, reaching more than conduct that actively advances the underlying predicate drug offense.

The legislative history of § 924(c)(1) reveals that the Congress expressly retained the "in relation to" requirement in preference to a more restrictive "in furtherance of" requirement. One bill that passed the Senate as part of the legislative process that culminated in the enactment of the current version of § 924(c)(1) would have penalized "[w]hoever, during and in relation to any [one of a number of enumerated drug] felon[ies] ... uses a firearm, or carries a firearm in furtherance of such crime ..." 131 Cong.Rec. 18,155, 18,235 (July 9, 1985) (reprinting S.49, a predecessor bill, as passed by the Senate). The Bureau of Alcohol, Tobacco, and Firearms criticized this proposal, however. Referring to the then-current version of § 924(c)(1), it argued that because "existing law already requires that the carrying be 'in relation to' the underlying crime," the proposed bill would "weaken[ ] the existing mandatory penalty provision." 4 U.S.C.C.A.N. 1327, 1346 (1986). Therefore, the "in furtherance of" requirement was deleted. This suggests that the Congress carefully avoided any implication that it intended to narrow the relationship that must be shown between the gun and the predicate offense in order to support a conviction under § 924(c)(1).

[11] In sum, it is apparent that positioning a firearm in such a way that it protects or is otherwise integrated into one's drug trafficking is not just a use of that gun, but is a use of that gun in relation to a drug trafficking offense and is therefore covered by the statute. What, then, is sufficient evidence that a gun found at the scene of a drug crime is being used in this way?

[12] Whenever there is sufficient evidence for a jury to find that the defendant at some time during the commission of the predicate drug offense put or kept a firearm in a place where it would be proximate to and accessible from a place that is clearly connected to his drug trafficking (*e.g.*, a place used to store, manufacture, or distribute drugs, or to keep the proceeds of drug transactions), the jury may also infer that the gun was being used to protect the drug trafficking operation, and was therefore being used in violation of § 924(c)(1). We emphasize that the jury may draw this inference regardless whether the predicate offense is one of drug distribution or of possession with intent to distribute drugs; we reject any suggestions to the contrary in our prior opinions. *Cf. Bruce*, 939 F.2d at 1055 ("Since possession with intent subsequently to distribute is in a sense a passive crime, it becomes somewhat difficult analytically to determine how one goes about using a gun in

relation to that crime"). As the Eighth Circuit has stated:

> It has become common knowledge that drug traffickers typically keep firearms available to protect themselves and their drugs and drug money. The presence and the availability of the firearms are often crucial to the "success" of the drug enterprise. It is therefore permissible for juries to infer that firearms found among a drug trafficker's paraphernalia are used to further the drug venture and are thus used during and in relation to drug trafficking within the meaning of section 924(c)(1).

United States v. Young-Bey, 893 F.2d 178, 181 (8th Cir.1990).

Obviously, a defendant is free to present evidence that he possessed the gun solely for a different purpose—for example, as part of a collection of guns that just happened to be kept in a place that later became involved in drug trafficking. *See, e.g., United States v. Vincent*, 20 F.3d 229, 234–35 (6th Cir.1994) (noting that defendant had argued that he was a gun collector); *United States v. Morrow*, 923 F.2d 427, 435 (6th Cir.1991) (noting that defendant had "strenuously argued at trial that the only purpose for the gun was to shoot snakes"). It will be the duty of the trier of fact, however, and emphatically not of this court, to weigh all such evidence and to determine whether, as a matter of fact, the weapon was being used as part of a drug trafficking operation.

This test for use is not only an accurate means of ensuring that the scope of § 924(c)(1) is as broad as the Congress intended it to be; it will also avoid the problems with the *Bruce-Morris-Derr* approach that we outlined above. First, as we have already noted, placing or keeping a gun in such a way that it protects a drug trafficking operation is clearly a "use" of a gun "in relation to a drug trafficking offense." In most cases, the gun's proximity to and accessibility from the actual site of the defendant's drug trafficking will be the most probative evidence that the defendant was using the firearm to protect his drug trafficking. Similarly, whether the defendant carried the gun with, or to or from the location of, the drugs will be the most probative evidence that he carried it during and in relation to a drug trafficking offense. Second, this test can be readily administered both by the district court, which must determine whether the Government's case may go to the jury, and by the appellate panel that must determine whether the evidence was sufficient to support a conviction under § 924(c)(1). As such, it will assure greater uniformity across cases while penalizing more precisely the conduct that the Congress intended to reach.

C. *Application of the Standard*

[13] Applying the standard for "use" to the present cases, we hold that the Government presented sufficient evidence to convict both Bailey and Robinson. When Bailey was arrested, there were 30 grams of cocaine, more than $3,200 in cash, and a loaded 9–mm. pistol in his car. He was properly convicted of possession with the intent to distribute the cocaine. Because the gun was found in the same place as the cash (namely, the trunk) and in the same car as the drugs that formed the basis of his drug trafficking conviction, the jury was entitled to infer that the money was the proceeds of an ongoing drug operation. The requirements of proximity and accessibility were both satisfied. The gun was proximate to the drugs and was easily accessible to Bailey at any time that he was handling either the drugs or the proceeds of their sale. The jury could reasonably infer that Bailey had intentionally incorporated the gun into his drug operation, was using it as part of that operation, and was therefore using it in relation to his possession with intent to distribute the drugs. Although the record does not demonstrate that Bailey had made a specific drug sale (the amount of money he had notwithstanding), there is little reason to doubt that he was using the gun in relation to the possessory offense regardless whether the gun actually furthered the possessory offense or emboldened him to commit that offense. It is enough that the jury was entitled to conclude that Bailey had put the gun into the car not for some unrelated purpose but because he was keeping drugs there; that alone establishes that the gun was used in relation to Bailey's drug trafficking offense. We therefore affirm his conviction.

[14] The same analysis requires that we affirm Robinson's conviction. In her case, the firearm was found in the same locked trunk as were the drugs that formed the basis of her conviction for possession with intent to distribute. Again, the requirements of proximity and accessibility are obviously satisfied: The gun was proximate to the drugs, and it was accessible to anyone, such as Robinson, who had access to the drugs. Because the jury found beyond a reasonable doubt that the drugs were Robinson's—a finding not at issue here—it could also infer from these facts that Robinson placed or kept the gun in the same location as the drugs in order to protect her possession of the drugs. Hence, the jury was entitled to conclude that Robinson used the gun in relation to the drug trafficking offense.

III. Conclusion

[15] In sum, we reject the open-ended *Bruce-Morris-Derr* approach and conclude instead that in order to survive a challenge to the sufficiency of the evidence for a conviction under § 924(c)(1), the Government need only point to evidence that the firearm in question was in proximity to the drugs, drug paraphernalia, or drug proceeds and was accessible to the defendant from the site of the drugs, drug paraphernalia, or drug proceeds involved in his or her predicate drug trafficking offense. When there is evidence of proximity and accessibility, we will affirm a conviction under § 924(c)(1). Because the government presented such evidence at the trials of both Bailey and Robinson, the judgments of conviction in each case are

Affirmed.

WALD, Circuit Judge, dissenting:

There are four reasons why I believe the majority's bright line test for determining whether a gun has been "used" to commit a drug offense is wrong. First: Although I agree that "use" under 18 U.S.C. § 924(c)(1) requires the government to show that the gun in some way "facilitated" the defendant's commission of the underlying drug offense, *see United States v. Jefferson*, 974 F.2d 201, 205 (D.C.Cir.1992), the sticking point is what kind of evidence it takes to make that showing. The *Bruce-Morris-Derr* line of cases did not in that sense set forth any test or formula for making such a determination; rather, it provided only a list of potentially relevant factors, *i.e.*, the type of weapon involved, whether it was loaded, the presence of expert testimony to support the government's theory of "use," the proximity of the gun to the drugs, and the accessibility of the gun to the defendant. By focusing on only two of the factors—(1) proximity of guns to drugs, drug paraphernalia, or drug proceeds and (2) accessibility of the guns to the defendant from a place used to store drugs, drug paraphernalia, or drug proceeds—to the exclusion of any other relevant factors, the majority in my view diminishes rather than enhances the prospect of accurate assessment on a case-by-case basis as to whether the gun was used to facilitate the drug offense. Congress, it should be noted, created no statutory presumption that "use" automatically would follow from the presence of any particular factors, and I can find no authority for courts to do so.

Rather than furnishing a clear and predictable guide for judges and juries, the majority's new "proximity and accessibility" test offers only a straightjacket from which judges must inevitably strain to escape, as they are confronted with a steady stream of new fact situations. But the circumstances at which they must look to justify any exception will almost certainly be the very factors mentioned in the much-maligned *Bruce-Morris-Derr* cases, *i.e.*, *United States v. Bruce*, 939 F.2d 1053, 1055–56 (D.C.Cir.1991), *United States v. Morris*, 977 F.2d 617, 621–22 (D.C.Cir.1992), and *United States v. Derr*, 990 F.2d 1330, 1338 (D.C.Cir.1993)—the size and type of the gun, whether it was loaded, and the presence or absence of ammunition. Succumbing to "certainty's siren call," the majority would prohibit a reviewing judge from looking at any of these factors in deciding whether there was enough evidence in a particular trial record to justify an inference that the defendant used the guns to facilitate the drug offense.

Second: Because the majority's ruling in this *in banc* decision will predictably be promptly reduced to new jury instructions, it seems passing strange to say that the proximity and accessibility test minimizes interference with jury discretion. *See* Opinion ("Maj.Op.") at 111 – 12. What the majority is actually doing is artificially limiting the factors that the jury may legitimately consider when determining whether a defendant "used" a firearm during and in relation to the underlying drug offense. In so doing it is impermissibly curbing the jury's discretion to consider the totality of circumstances that might be relevant to that fact-bound determination.

Third: The new test is not only unduly rigid, it is not even clear. I cannot fathom how the accessibility prong, as defined by the majority, will work, or what indeed it adds to the minimal proximity test. It seems that whenever the guns are located proximately to the drugs, they must also be potentially accessible to the defendant *from the place the drugs are being stored.* Op. at 115. Thus if the guns and drugs are found together in a locked strongbox and the defendant is miles away, under the majority's test, the guns are arguably accessible to the defendant from the place where the drugs are stored and are being "used" to facilitate the possession of the drugs. To state the proposition is to reveal its illogic. Under the statute it is the defendant who must use the gun, so it is the accessibility of the gun to him at the time of the drug offense charged that is relevant, not the accessibility of the gun to a phantom defendant who is positioned where the drugs are. This latter definition of accessibility makes no sense whatsoever. Indeed, the majority's peculiar definition of accessibility renders their "use" test much looser than that endorsed by several other circuits, which at least focus on whether the guns were proximate to the defendant as opposed to merely accessible from the place where the drugs, drug paraphernalia, or drug proceeds are stored. *See, e.g., United States v. Theodoropoulos,* 866 F.2d 587, 597–98 (3d Cir. 1989) (guns located in trash can on back porch of apartment not proximate enough to defendant to fit within § 924(c)); *United States v. McKinnell,* 888 F.2d 669, 675 (10th Cir.1989) ("use" element of § 924(c)(1) met when defendant had "ready access" to firearm, which was located within easy reach of defendant).

Fourth: In those cases like Bailey's that involve the distribution or actual possession of drugs, application of the new proximity and accessibility test or the old relevant factors approach of *Bruce–Morris–Derr* will not likely make much difference. But in the trickier cases where the crime being charged is possession with intent to distribute and the defendant himself is not in the immediate vicinity of the scene where the drugs and guns are found, the majority's test can produce a ridiculous result. This was the situation in *Derr* and *Robinson.* In *Derr,* 990 F.2d at 1332, and *Robinson,* 997 F.2d 884, 885 (D.C.Cir.1993), the defendant was not even in the same room as the unloaded guns, which were secreted along with the drugs in a locked place (closet in *Derr,* footlocker in *Robinson*). The crime was possession (constructive) with intent to distribute and the issue in both cases was whether the gun was being used to facilitate that possession. Although the majority would presumably find sufficient evidence to convict under § 924(c)(1) in both cases because the guns were proximate to the drugs and would have been accessible to each defendant once he or she reached the place where the drugs were being stored, I do not see how this result can be right. A defendant cannot have been "using" a gun to protect drugs when he was nowhere near the gun. A robber or competitor drug dealer who broke into the apartment would have been able to force the lock open without an iota of fear from the gun within because no one was there to use it.

I agree with Judge Williams that we must honor the ordinary meaning of words used by Congress, *see Perrin v. United States,* 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979); section 924(c) requires us to ask whether the gun was used to commit the drug trafficking crime for which the defendant was convicted, not whether the gun might have been used at some past or future time to commit some other past or future drug trafficking crime. *See Bruce,* 939 F.2d at 1055. To answer the right question, the

jury and a reviewing court needs access to all relevant information in order to replicate the real life scenario involving the guns, the drugs, and the defendant so that it can then decide if the defendant was in fact using the gun to facilitate the drug offense. The majority effectively leaves out the defendant altogether in its streamlined test; unfortunately, in so doing it distorts the plain meaning of the law, dispenses with logic, and invades jury discretion as well.

Finally, while I find Judge Williams' narrower interpretation of "use" quite persuasive, I cannot go so far as to agree that an actor who has intentionally placed a gun within easy access of his person in order to guard or to distribute drugs is not using the gun to facilitate the drug offense unless he openly brandishes, displays, or makes verbal threats about the gun. Where evidence of ready access to a gun by the defendant guarding or distributing the drugs exists, I think the jury can fairly draw the inference that such access is an intrinsic part of the criminal drug trafficking act. But conversely, I do not, like the majority, think it a fair inference that where the defendant has no such ready access to the gun, but instead is shown merely to be in constructive possession of the drugs which are located near the gun but away from the defendant, he is nonetheless using the gun to facilitate his possession or distribution. That I believe to be the principal difference between the other dissenters and myself, since I agree with them that "use" involves activity of some sort by a defendant who is in the immediate vicinity of the weapon, and not mere placement of the weapon near the drugs. That difference, however, is of sufficient import so as not to allow me to subscribe to Judge Williams' bright line rule any more than the majority's. Bright lines have a place in our jurisprudence but primarily with respect to what third parties like policemen or citizens can do without running afoul of the law. They are distinctly less useful in telling juries or judges what kind of evidence will suffice to show that a defendant is guilty of a generic crime that can be committed against a thousand different factual backdrops.

Because I believe that there was sufficient evidence to support Bailey's conviction for use in relation to actual possession of drugs with intent to distribute, *i.e.,* the gun in the trunk of the car was readily accessible to protect the drugs in the passenger compartment, but not Robinson's, *i.e.,* there was proof only of drugs and an unloaded gun in a locked trunk in a bedroom closet, I would affirm the first conviction and reverse the second. I would not adopt the majority's proximity and accessibility test but would instead continue to allow juries and judges to rely on all relevant factors to decide each case.

STEPHEN F. WILLIAMS, Circuit Judge, with whom SILBERMAN and BUCKLEY, Circuit Judges, join, dissenting:

Nearly all of our sister circuits say that mere possession of a firearm does not constitute "use" under 18 U.S.C. § 924(c). In the same breath, however, all—joined today by this court—allow conviction without evidence of the defendant's firing, brandishing, displaying or actively using the firearm in any way.[1] In joining the other circuits, the court undoubtedly simplifies our previous vague multifactored balancing test for review of § 924(c) cases for sufficiency of the evidence. And the majority is surely right that it is perfectly appropriate to overturn statutory interpretations where, as here, the precedent rejected is "fundamentally flawed", *Critical Mass Energy Project v. NRC,* 975 F.2d 871, 876 (D.C.Cir.1992) (en banc), and of course especially where, again as here, the precedent acts as "a positive detriment to coherence and consistency in the law ... because of inherent confusion created by an unworkable decision". *Id.* (quoting *Patterson v. Mc-*

1. Maj. Op. at 113 – 14. For a representative sampling, see *United States v. McFadden,* 13 F.3d 463, 465 (1st Cir.1994); *United States v. Breckenridge,* 782 F.2d 1317, 1322–23 (5th Cir.1986); *United States v. Lyman,* 892 F.2d 751, 753 (8th Cir.1989); *United States v. Harmon,* 996 F.2d 256, 258 (10th Cir.1993); *United States v. Poole,* 878 F.2d 1389, 1393 (11th Cir.1989). Other circuits are more honest. *United States v. Meggett,* 875 F.2d 24, 28 (2d Cir.1989) ("mere possession of a gun can constitute use"); *United States v. Torres-Rodriguez,* 930 F.2d 1375, 1385 (9th Cir.1991) (same).

Loan Credit Union, 491 U.S. 164, 173, 109 S.Ct. 2363, 2371, 105 L.Ed.2d 132 (1989)). In recent years, our cases have produced such inconsistency largely because we have failed to identify a clear definition of the term "use" of a firearm; it is that failure that has led to our frequent second-guessing of juries. In attempting to mend the incoherence of our previous approach by articulating a "proximity" plus "accessibility" test, however, the court has in effect diluted "use" to mean simply possession with a floating intent to use. In all but the rarest case, then, a defendant will be subject to punishment under § 924(c) if guilty of a drug trafficking offense and, while committing the offense, was in possession of a firearm. I think the wording, history and context of § 924(c) call for a different bright-line rule—one requiring active "use" rather than possession with a contingent intent to use.

* * * * * *

Section 924(c) imposes five additional years of punishment on

> Whoever, during and in relation to any crime of violence or drug trafficking crime ... *uses* or carries a firearm.

18 U.S.C. § 924(c)(1) (emphasis added).

The word "use" in ordinary language normally implies activity. Cf. *United States v. McFadden*, 13 F.2d 463, 467 (1st Cir.1994) (Breyer, J., dissenting) ("the ordinary meanings of the words 'use' and 'carry' ... connote activity beyond simple possession"). The majority asserts that a gun placed in one's drawer with an intent to use it in the event of an intruder is "in common parlance, [ ] a gun 'used' for domestic protection". Op. at 114. This is possible in some contexts, but they are contexts in which the fact of "use" is *assumed*. Q: "What do you use the gun for?" A: "I use it to protect my family." In that hypothetical the answerer accepts the questioner's premise that the gun is in some sense used. But as the question assumes something that is not established, the answerer might well go back to the premise: A: "Actually, I've never had to use it. I keep it here in case of an intruder."

In support of its sweeping idea of the plain meaning of "use", the majority cites *Astor v. Merritt*, 111 U.S. 202, 4 S.Ct. 413, 28 L.Ed. 401 (1884). The case illustrates the importance of context. The plaintiff, William Astor, sought a refund of customs duties of $1,880 (in 1878 dollars) paid on clothing he had purchased in Europe for personal use but had not yet worn at the time he reentered the United States. The statute provided an exemption for "[w]earing apparel in actual use and other personal effects (not merchandise), ... of persons arriving in the United States", *id.* at 203, 4 S.Ct. at 413 (citing § 2505 of the Revised Statutes, p. 489, 2d ed.), and the government had prevailed below by arguing that "actual use" required that each particular item of clothing have been worn before importation. The Court instead found that the term "actual use" must be read in light of the basic distinction drawn by the statute between articles that are "personal effects of [the traveller], and not merchandise, and not for sale," *id.* at 214, 4 S.Ct. at 419, and thus sought a meaning for "actual use" that, "while it comports with the ordinary habits of passengers and travellers, will not open the door for fraud." *Id.* Any meaning that required past wearing was plainly incompatible with that purpose. No such incompatibility with statutory purpose is created by reading "use" in § 924(c) to require some sort of active use, as opposed to simple possession with a view to possible future use. Aside from *Astor*'s emphasis on context, its expansive interpretation of the word "use" to protect travellers hardly raises the same issues as does an expansive interpretation of a term in a criminal statute.

Part of that context consists of § 924(c)'s origins. The initial version, passed in 1968, reads as follows:

> Whoever—
>
> (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States,
>
> shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years.

Pub.L. No. 90-351, 82 Stat. 233 (1968). In its 1968 form, the statute suggests that Congress had active employment of a weapon in mind. The phrase "uses *to commit*" implies that the defendant derived actual service from the weapon in completing an unlawful act. This service might take the form of injuring one's opposition by firing it, intimidating opponents by displaying or brandishing it, or offering it in exchange to complete an unlawful commercial transaction. It does not, however, imply merely potential service—i.e., keeping it hidden from view, intending to use it only if a contingency should arise. For the gun in that instance has not actually been used to commit the crime; its only function is to make successful completion more probable under contingencies that have not arisen.

In 1984, Congress made two basic changes: it raised the sentence enhancement to exactly five years and it both broadened and narrowed the scope of predicate offenses from "any felony" to "any crime of violence". At the same time, it collapsed the two clauses into one, substituting the phrase "during and in relation to" the predicate crimes for the earlier provisions linking the firearm to the predicate crimes. The statute then read:

> Whoever, during and in relation to any crime of violence, including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence, be sentenced to imprisonment for five years.

Pub.L. No. 98-473, 98 Stat. 2138 (1984). Congress gave two reasons for rewriting the statute, neither of which pertained to the scope of the term "use" or "carry". S.Rep. No. 225, 98th Cong., 2d Sess. 1, 312-13, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3490-91 ("Part D of title X represents a complete revision of subsection 924(c) *to overcome the problems with the present subsection discussed [below]*") (emphasis added). First, it sought to clarify the statute's approach to suspended and concurrent sentences. Second, it wished to overcome the Supreme Court's holdings in *Simpson v. United States*, 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed.2d 70 (1978), and *Busic v. United States*, 446 U.S. 398, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980), which negated the use of § 924(c) when another firearm penalty enhancement provision, such as that for armed robbery under 18 U.S.C. § 2113(d), applied. The government points to no evidence that in 1984 Congress sought to expand the meaning of "use". Moreover, Congress's adoption of the connective phrase "during and in relation to" could not have been intended to adjust for evolving problems of passive drug crimes; Congress only added drug trafficking offenses as predicate crimes in 1986. Pub.L. No. 99-308, 100 Stat. 456 (1986).

Moreover, the Senate Report relating to the 1984 change gave examples of use, both of them active: "pointing it at a teller or otherwise displaying it whether or not it is fired". S.Rep. No. 225, 98th Cong., 2d Sess. 1, 314, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3492. While these examples were not presented as exhaustive, they provide insight into the general class of behavior Congress had in mind. Even more indicative is the Senate Report's commentary on the "carry" provision which reads:

> Evidence that the defendant had a gun in his pocket but did not display it, or refer to it, could nevertheless support a conviction for "carrying" a firearm in relation to the crime if from the circumstances or otherwise it could be found that the defendant *intended to use* the gun if a contingency arose or to make his escape.... Moreover, the requirement that the firearm's use or possession be "in relation to" the crime would preclude its application in a situation where its presence played no part in the crime, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight.

Id. at 3492 n. 10 (emphasis added). The reference to intended use shows that Congress envisioned the "carry" provision to punish a defendant who did not "display" or otherwise actively use the firearm, but who had at least taken the active step of carrying the gun on a drug trafficking foray. Thus the Senate evidently saw "use" as a comparatively narrow term, with "carry" picking up cases of an alternative type of activity, where

the defendant did not actively "use" the weapon. The majority has turned this relation around, giving "use" such a broad meaning as to leave no apparent role for "carry".

Another element of § 924(c)'s context is the kindred provision, § 924(d), adopted in its original form in 1968, four months before the original § 924(c) "use or carry" provision. Pub.L. No. 90–351, 82 Stat. 233 (1968). The current version of § 924(d) provides for forfeiture of firearms "used in any knowing violation" of certain enumerated offenses (such as unlawful interstate transport and false statements in acquiring firearms), and of firearms "intended to be used" in other enumerated offenses (such as crimes of violence and drug trafficking crimes). 18 U.S.C. § 924(d)(1). Thus Congress, clearly quite alert to the distinction between firearms "used" in commission of a crime and merely "intended" for such use, provided for forfeiture *before* the weapon was used in drug trafficking, to nip the risk in the bud, apparently saving § 924(c)'s five years additional imprisonment for cases of actual use. "[U]sing a firearm" should not have a "different meaning in § 924(c)(1) than it does in § 924(d)". *Smith v. United States*, — U.S. —, —, 113 S.Ct. 2050, 2057, 124 L.Ed.2d 138 (1993).

Smith also observed, to be sure, that "it is clear from § 924(d)(3) that one who transports, exports, sells or trades a firearm 'uses' it within the meaning of § 924(d)(1)". *Id.* The Court inferred this from the specific statutes as to which § 924(d)(1) creates forfeiture liability, including, for example, 18 U.S.C. § 922(a)(5) (unlicensed transfer of a firearm to a resident of a different state); *id.* § 922(*l*) (importation of firearms). See *Smith*, — U.S. at — n. *, 113 S.Ct. at 2057 n. *. All of these, some of which the Court generalized under the word "transport", will nearly always involve active manipulation of the firearm. Given § 924(c)'s explicit "carry" provision, the parallelism inferred by the Court in *Smith* may not be complete. That does little, I think, to undermine § 924(d)'s value in evidencing congressional alertness to the difference between "use" and intent to use.

Congress was also explicitly conscious of the relation between § 924(c) and 18 U.S.C. § 2113(d), which provides sharply increased penalties for one who, committing a bank robbery or theft in violation of 18 U.S.C. § 2113(a) or (b), "assaults any person, or puts in jeopardy the life of any person by the *use* of a dangerous weapon or device". 18 U.S.C. § 2113(d) (emphasis added). The Senate Report in 1984 mentioned § 2113(d) and made clear that it intended that some defendants might be subject to *both* enhancements. S.Rep. No. 225, 98th Cong., 2d Sess. 1, 314, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3492. In his brief before the Supreme Court in *McLaughlin v. United States*, 476 U.S. 16, 106 S.Ct. 1677, 90 L.Ed.2d 15 (1986), the Solicitor General of the United States used that history to sketch out a view of the intended meanings of "use" and "carry" in § 924(c). In *McLaughlin*, where the court held that an unloaded gun could be a "dangerous weapon" under that statute, the Solicitor General argued that weapons that are concealed and unmentioned do *not* suffice for conviction under the aggravated robbery statute (18 U.S.C. § 2113(d)) because "the robber has not 'used' the weapon to 'assault' anyone". Brief for the United States at 19, *McLaughlin* (No. 85–5189). He went on to press the point about the relative narrowness of the word "use" and the parallelism between § 924(c) and § 2113(d):

> *It appears that Congress is of the view that something more than the carrying of a gun is required to establish its use.* In response to this Court's decisions[,] *Simpson v. United States*, 435 U.S. 6 [98 S.Ct. 909, 55 L.Ed.2d 70] (1978), and *Busic v. United States*, 446 U.S. 398 [100 S.Ct. 1747, 64 L.Ed.2d 381] (1980), Congress amended 18 U.S.C. [§] 924(c) in 1984 to provide an additional penalty of five years' imprisonment for anyone who "uses or carries" a firearm during a crime of violence, including a "crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device." Thus, the additional penalty of Section 924(c) now applies even though the defendant is convicted under a provision like Section 2113(d) that provides for an enhanced penalty for the use of a

> dangerous weapon or device. In spelling that out in the legislative history, in fact, Congress used Section 2113(d) as an example, stating that a person convicted under Section 2113(d) would also be subject to five years' imprisonment under Section 924(c) if the dangerous weapon or device was a firearm. S.Rep. 98–225, 98th Cong., 1st Sess. 313–314 (1983). In its example, the Senate report referred to "using a gun * * * by pointing it at a teller or otherwise displaying it." *Id.* at 314 [1984 U.S.C.C.A.N. 3492]. In a footnote, the report noted that "evidence that the defendant had a gun in his pocket but did not display it, or refer to it, could nevertheless support a conviction for 'carrying' a firearm" under Section 924(c). S.Rep. 98–225, *supra*, at 314 n. 10 [1984 U.S.C.C.A.N. 3492]. Thus, Congress appeared to understand, as the language of Section 924(c) suggests, that there is a distinction between carrying a gun and using a gun.

Id. at 19 n. 18 (emphasis added). Of course we owe no special deference to the views of the Solicitor General. Cf. *Crandon v. United States*, 494 U.S. 152, 177–78, 110 S.Ct. 997, 1011, 108 L.Ed.2d 132 (1990) (Scalia, J., concurring) (no deference owed to Department of Justice on interpretation of criminal statutes as they are "not administered by any agency but the courts"). Where he strongly presses a narrow reading of specific language in a criminal statute, however, it is certainly some evidence that that interpretation is a reasonable one, suggesting that, in the presence of another arguably reasonable reading, we are at least confronting a statutory ambiguity that under the rule of lenity should be resolved in favor of the narrow construction. In *United States v. Ray*, 21 F.3d 1134 (D.C.Cir.1994), we relied heavily on the Solicitor General's *McLaughlin* brief, saying, in our exposition of the word "use", "It is the brandishing or displaying, in other words, that the Court [in *McLaughlin*] said heightened the danger". *Id.* at 1137. We concluded that a defendant might "use" a concealed weapon (within the meaning of § 2113(d)) when he actively exploits its existence by *threatening* people with it. *Id.* at 1140–42. I would preserve the parallel treatment between "use" in both § 924(c) and § 2113(d), and require comparable activity.[2]

Nothing in *Smith* precludes limiting "use" to active employment. Its statement that "§ 924(c)(1)'s language sweeps broadly", — U.S. at —, 113 S.Ct. at 2054, means only that the proscribed use of firearms is not limited to the obvious or typical ways in which they may assist in the commission of a crime. Rather, a gun may be "used" regardless of whether it acts as an instrument to shoot, to bludgeon, or for exchange. That is, whether a firearm is "used" does not depend on whether it is employed in the customary way or a more creative way. But it does depend on whether the gun is employed at all, and nothing the Court said expands "use" beyond active employment. The observation that a gun "at least must 'facilitat[e] or ha[ve] *the potential* of facilitating' ", *id.* at —, 113 S.Ct. at 2059 (emphasis added), does not support an expanded definition of "use"; the Court made that point in reference to the separate "in relation to" requirement.

While the majority attempts to fine-tune the concept of facilitation (and thereby, use) through its twin guideposts of proximity and accessibility, the ultimate result is that possession amounts to "use" because possession enhances the defendant's confidence.[3] See Op. at 113, 116; *McFadden*, 13 F.3d at 466.

2. The majority points out that the crime at issue in *McLaughlin* and *Ray*, bank robbery involving assault or jeopardizing a person's life, inherently involves force or the threat of force, and suggests that while reading "use" narrowly to cover only open brandishing or verbal allusions made sense there, a broader reading is necessary for a furtive crime such as possession of drugs. Maj. Op. at 115 n. 1. But the point of the Solicitor General's brief in *McLaughlin* was that Congress intended a consistent (and relatively narrow) reading of the word "use" in both contexts, § 2113(d) and the relatively generic § 924(c).

3. Occasionally, and quite understandably, a court taking the majority's view will forget even the veneer of a requirement of more than possession in connection with the predicate crime. "[Defendant] was also convicted of two or three counts of *use or possession* of a firearm in connection with drug trafficking crimes in violation of 18 U.S.C. § 924(c)(1)." *United States v. Windom*, 19 F.3d 1190, 1192 (7th Cir.1994) (emphasis added).

Had Congress intended that, all it need have mentioned is possession. Cf. 18 U.S.C. § 929(a) (additional punishment for one who "uses or carries a firearm *and is in possession* of armour piercing ammunition") (emphasis added). In this regard, the majority's test is either so broad as to assure automatic affirmance of any jury conviction or, if not so broad, is unlikely to produce a clear guideline. Thus, if the new standard proves anything less than a carte blanche for conviction, it will lead to the same sort of continuous and vacillating review of jury verdicts that our past jurisprudence has yielded and that the court so rightly deplores.

* * * * * *

Under my view of "use" there can be no serious argument that either Robinson or Bailey "used" the weapons as to which they were charged under § 924(c). But Bailey plainly transported his firearm in the trunk of his car, and the jury in his case was instructed to find whether the defendant had "used or carried" the weapon. Thus the question arises whether transportation of a firearm under these circumstances can sustain a conviction for carrying a firearm.

We have found "carry" to cover a gun carried, not on the defendant's person, but on that of a confederate and within easy reach of the defendant himself. *United States v. Joseph*, 892 F.2d 118, 126 (D.C.Cir.1989) (defendant at all times "within a few steps of, and usually no more than an arm's span from, the firearm"). We have also held that a jury could find that a defendant's control over confederates who carried weapons was enough to establish constructive possession, *United States v. Harrison*, 931 F.2d 65, 71 (D.C.Cir.1991), and thus upheld the conviction (which alternatively might have been sustained on a theory of aiding and abetting). The same understanding embraces the defendant who transports a weapon by motor vehicle *and* has as ready access to the weapon as he would if it were in his pocket. See, e.g., *United States v. Cardenas*, 864 F.2d 1528, 1533 (10th Cir.1989) (the gun "was within effortless reach of his hands, more accessible than if it were in his own pocket"). Both readings are consistent with the basic concept of carrying a weapon on one's person (hand, pocket or holster), extended to catch the criminal who uses either confederates or mechanical transport (car, truck, ship or plane) to keep the firearm moving with him. In the motor vehicle case, the location of the weapon can render it as readily accessible as one held by an associate—if it is on hand for instant use, e.g., tucked under the driver's seat or resting on the dashboard or front passenger's seat.

I do not believe § 924(c) can properly be extended from these situations to that of the defendant who, like Bailey, transports the weapon in his car but is not shown to have had immediate access at any time while he was committing his drug trafficking offense. The effect would be to have § 924(c) embrace virtually every instance where a drug trafficker transports a weapon; in view of Congress's provision of a separate penalty in an adjacent section for anyone who "transports" a weapon with intent to commit a crime punishable by as much as a year's imprisonment, 18 U.S.C. § 924(b), that seems an improbable duplication. Cf. *Cardenas*, 864 F.2d at 1534–35 (rejecting equation of "carry" with "transport"). Rather, consonant with an active notion of "use", with the Senate Report's example of a weapon carried in the defendant's pocket, see *supra* at 122, and with the principle of the "constructive possession" cases that the defendant may use the gun on a moment's notice, the word "carry" must entail immediate availability. Thus, the gun locked in the trunk of Bailey's car was not accessible enough to support a conviction for carrying the gun during and in relation to his possession with intent to distribute drugs.

That is not to say that a defendant arrested with a gun in his trunk may never be convicted under § 924(c). Realistically, drug dealers often operate out of car trunks, returning from a distribution station to replenish drugs, deposit cash or retrieve a weapon. If the government presents evidence that the defendant handled the weapon by placing it in the car "during and in relation to" action taken in the commission of a predicate offense, that evidence would be sufficient to sustain a conviction. Alternatively, there may be cases where the government can

prove that the defendant bought the firearm such a short time before arrest on the drug trafficking offense as to sustain an inference (beyond a reasonable doubt) that he must have been handling it simultaneously with commission of the drug offense. But as a gun can obviously rest in a trunk for a long period, the mere fact of a gun's presence there, coupled with the defendant's use of the car for drug distribution, does not give rise to an inference of the necessary simultaneity of immediate access to the weapon (in a context of moving it about) and commission of the predicate crime. As there appears to be no evidence in the record against Bailey beyond his drug trafficking and the location of the weapon in the trunk, his conviction cannot be sustained on such a ground.

* * * * * *

The majority's expansive view of "use" virtually emasculates the role of the term "carry" in the statute. If "use" is understood to require real activity (such as brandishing, displaying or threatening), and "carry" to require conveying the firearm, coupled with immediate ability to put it to active use, both terms will have a meaningful yet distinct content, consistent with the language, context and legislative history of § 924(c).

* * * * * *

I would reverse the convictions of both Bailey and Robinson.

SILBERMAN, Circuit Judge, dissenting:

I think it most unfortunate that the majority opinion is directed, virtually entirely, at our past precedent dealing with the difficult question presented. We agreed, through the *en banc*ing of these cases, that we needed to think harder about § 924(c) to see if we could arrive at a more coherent standard firmly rooted in the statute. The standard advanced in Judge Williams' lucid opinion represents the product of that rethinking—at least on the part of the dissenters—and I would have thought that the majority might have marshaled the effort to confront fully the analysis set forth in the dissent.

WESTLAW KEY NUMBER SYSTEM

caine base. Gaulteau relies on this court's statement in *United States v. Brown*, 859 F.2d 974, 975–76 (D.C.Cir.1988) (per curiam), that "'[c]ocaine base' ... is any form of cocaine with the hydroxyl radical" and on the admission of the DEA chemist testifying in the present case that the hydroxyl radical was not present in the substance she tested. In *Brown*, we rejected a vagueness challenge to 21 U.S.C. § 841(b)(1), holding that the statute was valid because cocaine base is capable of "objective definition by means of chemical analysis." 859 F.2d at 976; *see also United States v. Cyrus*, 890 F.2d 1245, 1248 (D.C.Cir.1989). As one district judge recognized recently, we "clearly did not indicate that [the hydroxyl radical description] was the sole acceptable definition of cocaine base." *United States v. Michael*, 788 F.Supp. 1, 4 (D.D.C.1992), *aff'd mem.*, No. 92–3108, 1993 WL 185713, 1993 U.S.App. LEXIS 12873 (D.C.Cir. May 20, 1993) (per curiam). *Accord, United States v. Wheeler*, 972 F.2d 927, 930 (8th Cir.1992); *United States v. Shaw*, 936 F.2d 412, 416 (9th Cir. 1991).[1] Here, the government presented the testimony of a qualified expert who positively identified the substance tested as cocaine base. That testimony was sufficient to survive the defense motion and support the conviction. *Cf. United States v. Turner*, 928 F.2d 956, 960 n. 1 (10th Cir.) (noting expert testimony that qualified chemist can "easily differentiate" cocaine base from cocaine hydrochloride), *cert. denied*, — U.S. —, 112 S.Ct. 230, 116 L.Ed.2d 187 (1991).

Finally, Gaulteau's argument that 21 U.S.C. § 841(b)(1) is unconstitutionally vague in the absence of an established definition of the term "cocaine base," is without merit. *See Cyrus*, 890 F.2d at 1248 (capability of objective definition of cocaine base defeats vagueness challenge); *see also Shaw*, 936 F.2d at 416 (constitutionality of § 841(b)(1) does not depend on adoption of any particular definition, so long as cocaine base is "objectively distinguishable"). The statute is valid, and the evidence supports the conviction. The district court's judgment is

Affirmed.

1. We note that the "hydroxyl radical" description has been criticized as "simply incorrect." *See Michael*, 788 F.Supp. at 3; *cf. Wheeler*, 972 F.2d at 929 (reciting expert testimony that cocaine base does not contain hydroxyl radical). We will not revisit the correctness of that description here, in the absence of an appropriate record. We simply hold that *Brown* did not establish the hydroxyl radical as a "legal definition" of cocaine base with which the government must comply in order to prove a violation of section 841(b).

UNITED STATES of America

v.

Roland J. BAILEY, Appellant.

No. 90–3119.

United States Court of Appeals,
District of Columbia Circuit.

Oct. 8, 1993.

Before: MIKVA, Chief Judge; WALD, EDWARDS, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG, SENTELLE, HENDERSON, and RANDOLPH, Circuit Judges.

ORDER

PER CURIAM.

Appellant's Suggestion For Rehearing *En Banc* and the response thereto have been circulated to the full Court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service voted in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is granted and this case will be reheard by the Court sitting *en banc*.

It is **FURTHER ORDERED**, by the Court *en banc*, that the judgment of the court filed herein on June 18, 1993, 995 F.2d 1113, is hereby vacated.

APPENDIX C

tory Diseases 148–49 (James Merchant et al., eds., 1986) (ILO scores under 1/0 "are usually regarded as normal or as exhibiting essentially no evidence of pneumoconiosis," whereas those 1/0 and above "are generally regarded as positive for pneumoconiosis"). A finding of a disease is surely equivalent, in normal terminology, to a diagnosis, and thus the PPLs certainly offer no interpretation that repudiates or is irreconcilable with an existing legislative rule.

We stress that deciding whether an interpretation is an amendment of a legislative rule is different from deciding the substantive validity of that interpretation. An interpretive rule may be sufficiently within the language of a legislative rule to be a genuine interpretation and not an amendment, while at the same time being an incorrect interpretation of the agency's statutory authority. *Cf. Fertilizer Institute*, 935 F.2d at 1308 (petitioners' argument "confuses the question whether the agency is interpreting a statute with the question whether the agency is thoroughly, or properly, interpreting the statute"). Here, petitioners have made no attack on the PPLs' substantive validity. Nothing that we say upholding the agency's decision to act without notice and comment bars any such substantive claims.

Accordingly, the petitions for review are *Dismissed.*

KEY NUMBER SYSTEM

UNITED STATES of America

v.

Roland J. BAILEY, Appellant.

No. 90-3119.

United States Court of Appeals, District of Columbia Circuit.

Argued April 5, 1993.

Decided June 18, 1993.

Defendant was convicted of possession with intent to distribute cocaine, using or carrying firearm in connection with drug trafficking offense, and possession of firearm by felon after jury trial in the United States District Court for the District of Columbia, Stanley S. Harris, J. Defendant appealed. The Court of Appeals, D.H. Ginsburg, Circuit Judge, held that: (1) defendant was not entitled to instruction on simple possession of cocaine as lesser-included offense of possession of intent to distribute, and (2) loaded high-caliber gun found in trunk of car driven by defendant could be considered "used during and in relation to" drug trafficking crime.

Affirmed.

D.H. Ginsburg, Circuit Judge, dissented as to part II.B and filed opinion.

1. Criminal Law ⇐814(20)

Defendant was not entitled to instruction on simple possession of cocaine as lesser-included offense of possession with intent to distribute cocaine, where there was no evidence from which jury could rationally have concluded that defendant possessed cocaine without intending to distribute it since he was nabbed with 30 grams of cocaine packaged for street distribution and with more than $3,000 in small bills. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a), 21 U.S.C.A. § 841(a).

2. Criminal Law ⇐795(1)

District judge is required to give lesser-included offense instruction only when jury could rationally find defendant guilty of lesser offense, yet acquit him of greater.

3. Weapons ⇐4

Loaded high caliber weapon located in trunk of automobile along with $3,216 in small bills was "used" to facilitate defendant's sale of narcotics and possession of drugs that necessarily preceded those transactions, for purposes of conviction for use of firearm during and in relation to drug trafficking activity, even though the gun was not within the defendant's reach while he was driving; cocaine found in car packaged for sale and small bills in trunk logically supported inference that defendant had already been dealing drugs from his car and loaded gun in trunk was sufficiently accessible so as to have been used to protect prior distribution effected outside confines of passenger compartment of car. 18 U.S.C.A. § 924(c)(1).

See publication Words and Phrases for other judicial constructions and definitions.

4. Weapons ⇐4

Evidence of nexus between particular drug offender and firearm, for purposes of conviction for offense of use of firearm during and in relation to drug trafficking crime, can be, and usually is, satisfied by proof that defendant actually or constructively possessed gun. 18 U.S.C.A. § 924(c)(1).

5. Weapons ⇐4

To establish that weapon was "used," for purpose of conviction for use of firearm during commission of drug trafficking offense, government need not establish that defendant brandished or discharged weapon or even that he was carrying gun at time of specific transaction; rather, in addition to showing possession, i.e., nexus between firearm and offender, government need only prove connection between firearm and underlying drug offense; government is obliged to show that firearm was available to provide protection to defendant in connection with his engagement in drug trafficking. 18 U.S.C.A. § 924(c)(1).

Appeal from the United States District Court for the District of Columbia (CR 89-00310-01).

James G. Duncan, with whom Roy T. Englert, Jr., Washington, DC (appointed by this court) were on the brief, for appellant.

Barbara K. Bracher, Asst. U.S. Atty., with whom Jay B. Stephens, U.S. Atty. at the time the brief was filed, John R. Fisher, Elizabeth Trosman, and Odessa Vincent, Asst. U.S. Attys., Washington, DC, were on the brief, for appellee.

* Except Part II.B., which is filed *per curiam.*

Before D.H. GINSBURG, SENTELLE, and RANDOLPH, Circuit Judges.

D.H. GINSBURG,* Circuit Judge:

Roland J. Bailey appeals his conviction for (1) possession with intent to distribute five grams or more of cocaine in violation of 21 U.S.C. § 841(a); (2) using or carrying a firearm in connection with that drug trafficking offense in violation of 18 U.S.C. § 924(c); and (3) possession of a firearm by a felon in violation of 18 U.S.C. § 922(g). He alleges that the district court committed reversible error by refusing to instruct the jury on simple possession as a lesser included offense of possession with intent to distribute cocaine; that there was insufficient evidence of his having "used" a gun to convict him under 18 U.S.C. § 924(c); and that the 16-month delay between his arrest and indictment violated his right to a speedy trial pursuant to 18 U.S.C. § 3161(b). We affirm the convictions on all counts.

I. BACKGROUND

In May 1988 Officers Ronald T. Washington and Kevin Rice of the Metropolitan Police Department stopped Bailey's car after noticing that it had no front license plate and no inspection sticker. Officer Washington asked Bailey for his driver's license but Bailey instead handed him a District of Columbia identification card. Officer Washington then ordered Bailey to get out of his car. As Bailey exited the car, Officer Washington saw him push something between the seat and the front console. Upon searching the passenger compartment, Officer Washington found one round of ammunition and 27 plastic bags containing a total of 30 grams of cocaine. After placing Bailey under arrest, Officer Rice searched the trunk and found there a loaded 9-mm. pistol and $3,216 in cash, mostly small bills.

Later that month Bailey was indicted in the Superior Court of the District of Columbia on D.C. drug and weapons charges. In September 1989 a superseding indictment was handed down in federal district court,

charging Bailey with the federal drug and weapon charges enumerated above.

At Bailey's trial Detective Charles DiDomenico, a narcotics expert, testified that the drugs found in the appellant's car were packaged for sale in $50 bags and that the quantity and packaging were "not consistent with personal use." He also stated that drug dealers frequently carry weapons "not only to protect themselves, but [also] to protect their assets, drugs and money." The jury found the appellant guilty as charged, and the district court sentenced him to concurrent prison terms of 51 months each on the first and third charges and sixty months on the second charge.

II. ANALYSIS

As indicated above, the appellant offers three grounds for appeal.

A. Instruction on Lesser Included Offense

[1] First, the appellant argues that the district court erred in refusing to instruct the jury on simple possession of cocaine as a lesser-included offense of possession with intent to distribute cocaine. Not so.

[2] The district judge is required to give a lesser-included offense instruction only when "a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater." *Schmuck v. United States*, 489 U.S. 705, 716 n. 8, 109 S.Ct. 1443, 1451 n. 8, 103 L.Ed.2d 734 (1989); *see also United States v. Thornton*, 746 F.2d 39, 47 (D.C.Cir.1984) (lesser-included offense instruction is required "if there is any evidence fairly tending to bear upon the lesser included offense, 'however weak' that evidence may be") (quoting *Belton v. United States*, 382 F.2d 150, 155 (D.C.Cir.1967)). There must "be some rational basis for the lesser charge; otherwise it is merely a device for [a] defendant to invoke the mercy-dispensing prerogative of the jury." *United States v. Sinclair*, 444 F.2d 888, 890 (D.C.Cir.1971); *see also Kelly v. United States*, 370 F.2d 227, 229 (D.C.Cir.1966) ("An element of the mercy-dispensing power is doubtless inherent in the jury system, and may well be a reason why a defendant seeks a lesser included offense instruction, but it is not by itself a permissible basis to justify such an instruction").

In this case there was no evidence from which a jury could rationally have concluded that Bailey possessed the cocaine without intending to distribute it. He was nabbed with the 30 grams of cocaine appropriately packaged for street distribution and with more than $3000 in small bills. According to the uncontradicted testimony of the Government's narcotics expert, possession of 27 packages each containing $50 worth of cocaine is inconsistent with merely personal use. *See United States v. Beckham*, 968 F.2d 47, 53 (D.C.Cir.1992) (upholding denial of instruction on lesser-included offense of simple possession where Government drug expert testified without rebuttal that stash was incompatible with personal use); *accord United States v. Payne*, 805 F.2d 1062, 1067 (D.C.Cir.1986) ("If the jury believed the Government's [expert testimony], the jury would have had no rational basis for returning a guilty verdict of simple possession").

As in *Beckham*, therefore, "No aspect of the government or defense cases—not even a combination of aspects of each—supports a simple possession theory." 968 F.2d at 52. Accordingly, we affirm Bailey's conviction for possession with intent to distribute.

B. Use of the Firearm

[3] Section 924(c)(1) provides, in pertinent part:

> Whoever, during and in relation to any ... drug trafficking crime ... uses or carries a firearm, shall, in addition to the punishment provided for such ... drug trafficking crime, be sentenced to imprisonment for five years.

Bailey claims that there was insufficient evidence for the jury to find that he "use[d]" the 9-mm. gun found in his trunk "during and in relation to" a drug trafficking crime.

"As a jury has found [the appellant] guilty, we must consider the evidence in the light most favorable to the Government," *United States v. Jefferson*, 974 F.2d 201, 205 (D.C.Cir.1992), and allow the Government "the benefit of all reasonable inferences that may be drawn from the evidence." *United*

States v. Sutton, 801 F.2d 1346, 1358 (D.C.Cir.1986). In determining the sufficiency of the evidence, we must affirm the appellant's conviction if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (emphasis in original); *United States v. Derr*, 990 F.2d 1330, 1336 (D.C.Cir.1993); *United States v. Morris*, 977 F.2d 617, 619 (D.C.Cir. 1992); *United States v. Long*, 905 F.2d 1572, 1577 (D.C.Cir.1990); *United States v. Poston*, 902 F.2d 90, 94 (D.C.Cir.1990).

[4] This court has fashioned a two-part test to determine whether a defendant "used" a firearm "during and in relation to" the drug trafficking crime he committed. *See Derr*, 990 F.2d at 1337; *Jefferson*, 974 F.2d at 205. First, there must be evidence of a "nexus ... between [the] particular drug *offender* and the firearm." *Long*, 905 F.2d at 1577 (emphasis added). This element can be, and usually is, satisfied by proof that the defendant actually or constructively possessed the gun. *See Derr*, 990 F.2d at 1337. Second, there must be evidence "that the guns facilitate[d] the predicate *offense* in some way." *United States v. Harris*, 959 F.2d 246, 261 (D.C.Cir.1992) (emphasis added); *accord Derr*, 990 F.2d at 1337. "Both elements must be proven to establish criminal liability under § 924(c)." *Jefferson*, 974 F.2d at 205.

[5] Because the appellant concedes that he possessed the firearm, we need address only the question whether the Government has shown that the gun facilitated the appellant's commission of a drug trafficking offense. It is well-settled that "mere possession of a gun at the time that the crime is committed is not enough to establish use." *United States v. Bruce*, 939 F.2d 1053, 1054 (D.C.Cir.1991). On the other hand, the Government need not establish that the defendant brandished or discharged the weapon, *see Morris*, 977 F.2d at 621; *Long*, 905 F.2d at 1576; *United States v. Evans*, 888 F.2d 891, 896 (D.C.Cir.1989); *United States v. Castro-Lara*, 970 F.2d 976, 983 (1st Cir. 1992); *United States v. Plummer*, 964 F.2d 1251, 1255 (1st Cir.1992); *United States v. Alvarado*, 882 F.2d 645, 653 (2d Cir.1989); *United States v. Meggett*, 875 F.2d 24, 29 (2d Cir.1989); *United States v. Raborn*, 872 F.2d 589, 595 (5th Cir.1989); *United States v. Tolliver*, 937 F.2d 1183, 1190 (7th Cir.1991); *United States v. Lyman*, 892 F.2d 751, 753 (8th Cir.1989); *United States v. Matra*, 841 F.2d 837, 841–43 (9th Cir.1988); *United States v. Mason*, 658 F.2d 1263, 1270–71 (9th Cir.1981); *United States v. Moore*, 580 F.2d 360, 362 (9th Cir.1978), or even "that he was carrying the gun at the time of a specific transaction." *United States v. Knox*, 950 F.2d 516, 518 (8th Cir.1991).

Rather, in addition to showing possession (i.e. a nexus between the firearm and the offender), the Government need only "prove a connection between the firearm and an underlying drug offense," here possession with intent to distribute cocaine. *Jefferson*, 974 F.2d at 206; *accord Castro-Lara*, 970 F.2d at 983; *United States v. Robertson*, 706 F.2d 253, 256 (8th Cir.1983); *United States v. Stewart*, 779 F.2d 538, 540 (9th Cir.1985). More precisely, "the Government is only obliged to show that the firearm was available to provide protection to the defendant in connection with his engagement in drug trafficking." *United States v. Molinar-Apodaca*, 889 F.2d 1417, 1424 (5th Cir.1989); *accord United States v. Munoz-Fabela*, 896 F.2d 908, 911 (5th Cir.1990) ("It is enough that the firearm was present at the drug-trafficking scene, that the weapon could have been used to protect or facilitate the operation, and that presence of the weapon was in some way connected with drug trafficking"); *Stewart*, 779 F.2d at 540 (Government must show that defendant possessed firearm and "that the firearm facilitated or had a role in the crime, such as emboldening an actor who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others").

The Supreme Court has recently endorsed an "expansive" understanding of what constitutes use "in relation to" a drug trafficking offense. *Smith v. United States*, — U.S. —, —, 113 S.Ct. 2050, 2058, 124 L.Ed.2d 138 (1993). In *Smith* the Supreme Court cites the Webster Dictionary definition of "in relation to" as meaning "with reference to"

or "as regards." *Id.* (*quoting* Webster's New International Dictionary of the English Language, at 2102). The Court then states that "[t]he phrase 'in relation to' thus, at a minimum, clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." *Smith*, *supra* at ——, 113 S.Ct. at 2059. Modifying the verb "use" with "in relation to" serves the purpose of " 'allay[ing] explicitly the concern that a person could be' punished under § 924(c)(1) for committing a drug trafficking offense 'while in possession of a firearm' even though the firearm's presence is coincidental or entirely 'unrelated' to the crime." *Id.* at ——, 113 S.Ct. at 2058 (*quoting Stewart*, 779 F.2d at 539 (Kennedy, J.)).

Here the defendant was carrying in the front seat of his car crack cocaine neatly packaged for sale in $50 bags, and in the trunk $3,216 in small bills. The trier of fact could reasonably infer that the money was the proceeds of several already-completed drug transactions. *Cf. United States v. Curry*, 911 F.2d 72, 80 (8th Cir.1990) ("we believe it was permissible to infer that the large sums of unexplained cash found in the same bedroom as the guns came, at least in part, from drug sales" given the large quantities of high purity cocaine found elsewhere in the house); *United States v. Beverly*, 921 F.2d 559, 563 (5th Cir.1991) ("A jury ... could reasonably connect the [$2,200 in] cash to the drug trafficking"); *compare Bruce*, 939 F.2d at 1055–56 (showing that gun was available only to protect future intended distribution of drugs insufficient for § 924(c) conviction). As the Government's expert witness testified, a drug dealer often carries a gun in order to protect himself, his contraband, and his money. *See United States v. LaGuardia*, 774 F.2d 317, 321 (8th Cir.1985) (recognizing "the utility of firearms in advancing criminal adventures in narcotics" and observing that "[w]eapons can be used for protection or intimidation and therefore facilitation of illegal transactions"); *accord United States v. Grant*, 545 F.2d 1309, 1313 (2d Cir.1976); *United States v. Wiener*, 534 F.2d 15, 18 (2d Cir.1976); *United States v. Rosado*, 866 F.2d 967, 970 (7th Cir.1989); *Curry*, 911 F.2d at 80; *United States v. Young-Bey*, 893 F.2d 178, 181 (8th Cir.1990); *United States v. Milham*, 590 F.2d 717, 721 (8th Cir.1979); *Stewart*, 779 F.2d at 540; *Mason*, 658 F.2d at 1271.

To be sure, the gun here was not within Bailey's reach while he was driving. In that circumstance, "the court's critical concern is not whether the gun was instantly available or exclusively dedicated to the narcotics trade, but whether it was available for use in connection with the narcotics trade." *Castro-Lara*, 970 F.2d at 983 (quotation marks and citation omitted); *accord United States v. Boyd*, 885 F.2d 246, 250 (5th Cir.1989) ("It is enough that the firearm was present at the drug-trafficking scene, that the weapon could have been used to protect or facilitate the operation, and that the presence of the weapon was in some way connected with the drug trafficking"); *Young-Bey*, 893 F.2d at 181 (jury may "infer that firearms found among a drug trafficker's paraphernalia are used to further the drug venture and are thus used during and in relation to drug trafficking within the meaning of section 924(c)"); *cf. United States v. Acosta-Casares*, 878 F.2d 945, 952 (6th Cir.1989) (" 'uses' and 'carries' [in § 924(c)(1)] should be construed broadly to cover the gamut of situations where drug traffickers have ready access to weapons with which they secure or enforce their transactions").

Indeed, if Bailey sold drugs from anywhere outside the passenger compartment of his car, *e.g.*, in a building or on a street corner—a rather likely scenario, to say the least—then he could remove the gun from the trunk and carry it with him as he conducted this risky business. *Cf. Jefferson*, 974 F.2d at 207 (gun stored in backyard next to contraband "was sufficiently accessible"); *Castro-Lara*, 970 F.2d at 983–84 (unloaded gun in locked automobile trunk was available for use during and in relation to drug trafficking crime); *Beverly*, 921 F.2d at 561–63 (unloaded guns and ammunition in safety deposit box underneath mattress in room where drugs were found sufficient to convict under § 924(c)); *Molinar-Apodaca*, 889 F.2d at 1419–1424 (upholding conviction where gun and cash were in locked safe in house

and drugs were stashed in shed outside); *Rosado*, 866 F.2d at 968–69 (evidence sufficient for § 924(c)(1) conviction where defendant left gun in own car and conducted drug transaction in nearby car); *United States v. Knox*, 950 F.2d 516, 519 (8th Cir.1991) (gun in passenger compartment of car sufficiently available to defendant carrying drugs and loaded ammunition clip as he exited nearby building); *Curry*, 911 F.2d at 80 (although "found in a different room than the cocaine" gun was "readily available to secure the possession of [appellant's] cocaine and cash"); *Stewart*, 779 F.2d at 539 (defendant in car in front of his residence had "rifle under his control in the trunk of his car"). Moreover, it was unlikely that in conducting a sale—the moment of maximum exposure to depredation—the defendant would fail to protect his inventory, including the 27 bags of cocaine that later formed the basis of the indicted charge. The jury could reasonably infer therefore that the weapon located in the trunk was used to facilitate the defendant's sales of narcotics and the possession of all of the drugs that necessarily preceded those transactions. *See United States v. Hadfield*, 918 F.2d 987, 998 (1st Cir.1990) ("so long as one purpose in situating the weapon nearby was to protect the narcotics enterprise, that need not have been defendant's sole purpose"); *Stewart*, 779 F.2d at 539 ("Given the use of firearms in some drug transactions ... and the known risks of conducting an illegal drug business, the jury could infer from all of the evidence that [defendant]'s possession of the [firearm] outside his residence was intended to facilitate the drug operations or secure the premises where contraband and other evidence were located"); *see generally United States v. Ingraham*, 832 F.2d 229, 240 (1st Cir.1987) ("The law is not so [ostrich-like] as to compel a criminal jury to ignore that which is perfectly obvious").

The appellant argues that because the gun was in the trunk, under our holdings in *United States v. Bruce*, 939 F.2d 1053 (D.C.Cir. 1991) and *United States v. Derr*, 990 F.2d 1330, 1339 (D.C.Cir.1993), it can not be deemed to have protected or facilitated his past possession of the cocaine. In *Bruce* the court found that the small derringer in the defendant's raincoat could not have been used to protect his possession of drugs because the small gun was "hardly the sort of weapon a drug dealer would employ for protection against an effort to penetrate a crack house." *Bruce*, 939 F.2d at 1055. Instead, the gun was clearly intended "to be used for defendant's protection at the time and place of subsequent distribution." *Bruce*, 939 F.2d at 1056. Similarly, in *Derr* we found that the placement of an unloaded gun behind a padlocked door in a house "suggested that it was far more likely [to] ... be used to protect the [future] distribution, rather than the possession, of the drugs." *Derr*, 990 F.2d at 1339. Indeed, in getting his gun from the closet the defendant in *Derr* risked "expos[ing] the drugs to capture," so that "the gun seems to have been put where it was least likely to protect possession of the drugs." *Id.* (footnote omitted).

Here, in contrast, the cocaine packaged for sale and the $3,216 in small bills in the trunk logically support the inference that Bailey had already been dealing drugs from his car. And the loaded gun in the trunk was sufficiently accessible to have been used to protect a prior distribution effected outside the confines of the passenger compartment of the car.

In protecting such an earlier distribution of drugs, the gun was necessarily used also to protect Bailey's earlier possession of cocaine. As he walked from his car to the point of sale, like any drug dealer he was constantly in danger of being attacked by bandits or by a potential customer. Until the actual sale, of course, he possessed the narcotics. In effect, for a drug dealer on the streets, possession and distribution are inextricably linked, *cf. Bruce*, 939 F.2d at 1055 ("in the typical crack house possession and distribution are intertwined"), and the jury could reasonably conclude that during the tense moments leading up to the exchange of drugs and money, Bailey used the gun in the trunk to protect his inventory of drugs (including the 27 bags recovered by the police). *Accord Derr*, 990 F.2d at 1337 ("there must be evidence showing that the firearm actually facilitated the *possession* of the drugs") (emphasis in original).

For the foregoing reasons, we believe that *Derr* and *Bruce* can be distinguished from the situation here. In any event, the precedential value of *Derr* and *Bruce* has been called into question by the Supreme Court's recent decision in *Smith v. United States*, — U.S. —, —, 113 S.Ct. 2050, 2058, 124 L.Ed.2d 138 (1993), which adopts a much less restrictive interpretation of what constitutes "use" of a firearm "in relation to" a drug trafficking offense. *Smith* states that a gun is used in relation to a drug trafficking offense if "the firearm [has] some purpose or effect with respect to the drug trafficking crime." *Id.* at —, 113 S.Ct. at 2059. Clearly, the gun had the purpose of protecting the cash in the trunk, and only slightly less obviously, had the purpose of protecting the drugs and money on Bailey's person. This is not a case where "the firearm's presence is coincidental or entirely 'unrelated' to the crime." *Id.* at —, 113 S.Ct. at 2059 (internal citation omitted). When § 924(c) is construed "in accord with its ordinary or natural meaning," as we are reminded to do in *Smith*, *id.* at —, 113 S.Ct. at 2054, we think a rational jury could easily have concluded that Bailey "used" the loaded high-caliber gun in the trunk of the car he was driving "during and in relation to" a drug trafficking crime.

C. Speedy Trial Act Challenge

Bailey argues that the 16-month delay between his arrest and his indictment in federal court violates his right to a speedy trial pursuant to the Speedy Trial Act, 18 U.S.C. § 3161(b). In his brief the appellant concedes that *United States v. Mills*, 964 F.2d 1186, 1189 (D.C.Cir.1992) (*en banc*), forecloses his appeal on this issue, but states that he wishes to preserve his point in case the Supreme Court grants certiorari in *Mills*. Since the filing of Bailey's brief, however, the Court has denied certiorari in *Mills*, — U.S. —, 113 S.Ct. 471, 121 L.Ed.2d 378 (1992), and we therefore affirm the district court on this issue.

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is in all respects

Affirmed.

D.H. GINSBURG, Circuit Judge, dissenting as to Part II.B.:

Sometimes the law *is* "a ass, a idiot," Mr. Bumble. Our recent holdings in *United States v. Derr*, 990 F.2d 1330 (D.C.Cir.1993), and *United States v. Bruce*, 939 F.2d 1053 (D.C.Cir.1991), are cases in point. But until the Supreme Court or this court sitting *en banc* changes the law, those decisions are the law and we must apply them faithfully. Because I do not believe that our disposition of the § 924(c) issue can honestly be reconciled with *Derr* and *Bruce*, I respectfully dissent.

In *Derr* an unloaded .357 magnum and nine rounds of ammunition were found alongside cash, drugs packaged for sale, and a scale, all in a locked closet in an apartment. There was incontestable evidence of drug trafficking from the apartment. *See* 990 F.2d at 1332, 1338. Nonetheless, this court held that the gun could not have been " 'used' to facilitate the predicate offense" of possession with intent to distribute drugs because the unloaded firearm was too inaccessible to protect the possession of the drugs in the apartment. *Id.*, at 1337. Similarly, in *Bruce* a loaded gun was found stored with drugs, cash, and ziplock bags in a raincoat hanging in a closet. Again the court held that the gun's location was too remote from the defendant for him to use it to protect his possession of the drugs and thus to facilitate the predicate offense of possession with intent to distribute the drugs. *See* 939 F.2d at 1056.

The present case presents a similar fact pattern: a loaded 9-mm. pistol was found alongside cash in the locked trunk of a car, while the drugs were located next to the defendant in the front seat of the car. The court distinguishes *Derr* and *Bruce*, however, on the ground that a jury could reasonably infer that Bailey had used the gun here to protect himself and his goods during drugs sales made before his arrest, as well as the cash proceeds thereof. The problem is that the exact same inference could easily have been drawn in *Derr* and *Bruce*, but the court in those cases found the evidence insufficient as a matter of law to support a conviction for

using a firearm to facilitate a drug trafficking offense.

I do not see any principled basis for distinguishing *Derr* or *Bruce* from the present case. That the gun in *Derr* was unloaded is certainly not dispositive. An unloaded gun can facilitate a drug trafficking crime almost as well as a loaded gun, by emboldening its owner and intimidating others. *See United States v. Gutierrez-Silva*, 983 F.2d 123, 124–25 (8th Cir.1993) (upholding § 924(c) conviction involving unloaded gun in closet of apartment containing no ammunition; crediting expert's testimony that "it is very difficult for a person to determine whether a gun was loaded or not when the gun is pointed at that person"); *cf. McLaughlin v. United States*, 476 U.S. 16, 17, 106 S.Ct. 1677, 1678, 90 L.Ed.2d 15 (1986) (holding that unloaded handgun is "dangerous weapon" under federal bank robbery statute on the grounds that a gun "is always dangerous even though it may not be armed").* Nor can *Bruce* be distinguished on the ground that the defendant there possessed a smaller firearm, a Derringer. The court can not substitute its judgment for the jury's by inferring that an otherwise accessible gun is too small to be useful.

Such particularistic distinctions are all beside the point anyway under the highly formalistic analysis that this circuit has apparently adopted. In order to uphold a conviction under § 924(c) there must be evidence that the gun "facilitate[d] the predicate offense in some way." *United States v. Harris*, 959 F.2d 246, 261 (D.C.Cir.1992). Although the issue of what constitutes a "predicate offense" in this context appears not to have been contested in prior cases, our caselaw requires that a § 924(c) conviction be predicated upon a drug offense charged in the indictment and proved at trial—which in this case could only be possession with intent to distribute. *See, e.g., Derr*, 990 F.2d at 1337 (gun must have provided protection during "the time of the possession which is the basis of the charge"); *cf. United States v. Laing*, 889 F.2d 281, 288 (D.C.Cir.1989) (upholding § 924(c) conviction despite acquittal for predicate offense because jury may have still been "convinced of the defendant's guilt").

Thus when the defendant is charged only with possession, "there must be evidence showing that the firearm actually facilitated the *possession* of the drugs." *See Derr*, 990 F.2d at 1337 (emphasis in original). I for one cannot imagine how a gun in a locked car trunk could have been used to protect the possession of the 27 bags in the front seat—if one accepts the premise that the guns in *Derr* and *Bruce* could not protect the drugs with which they were closeted. *See Derr*, 990 F.2d at 1337–1339 (unloaded gun stowed together with ammunition, drugs, and cash in locked closet in apartment insufficiently accessible to protect drugs in same closet); *Bruce*, 939 F.2d at 1056 (gun in raincoat hanging in closet not sufficiently available to protect drugs in pocket of same raincoat).

It is irrelevant that the jury here might reasonably have inferred that the gun was used to protect the possession of drugs Bailey had sold earlier or the cash proceeds of those sales, because neither the cash nor the already-sold drugs formed "the basis of the indicted charge" against him. *Compare Bruce*, 939 F.2d at 1055 (rejecting Government's argument "that since possession of drugs with intent to distribute is a 'continuing crime,' " proximity is sufficient to establish "use") *with* Op. at 1118 ("The jury could reasonably infer ... that the weapon located in the trunk was used to facilitate the defendant's sales of narcotics and the possession of all of the drugs that necessarily preceded those transactions").

All that said, it seems to me that the "predicate offense" analysis of our circuit defies both apparent congressional intent and common sense. Congress clearly enacted § 924(c) in order to deter drug dealers from

* *See also* DIRTY HARRY (Warner Bros. 1971) (bank robber decides not to reach for pistol when inspector points gun at him and says, "I know what you're thinking: 'Did he fire six shots, or only five?' Well, to tell you the truth, in all this excitement I've kinda lost track myself. But being this is a .44 magnum, the most powerful handgun in the world, and would blow your head clean off, you've got to ask yourself one question: 'Do I feel lucky?' ... Well, do ya, punk?") (*quoted in* Eric Bailey, *How to Get Your Own Back*, DAILY TELEGRAPH, Feb. 5, 1993, at 17).

arming themselves, which vastly enhances the threat they pose to the community. *See Smith v. United States*, — U.S. —, —, 113 S.Ct. 2050, 2059, 124 L.Ed.2d 138 (1993), ("introduction [of guns] into the scene of drug transactions dramatically heightens the danger to society") (*quoting United States v. Harris*, 959 F.2d 246, 262 (D.C.Cir.1992)). Common sense indicates that although he was not charged with distribution, Bailey had in fact been dealing drugs; he was not carrying more than $3000 in small bills for nothing and he was not planning to give the last of his drugs away free or to raffle them off for charity. Common sense also suggests that Bailey had taken the gun along to facilitate his drug transactions; he was not just delivering the gun to his fearful grandmother for use as domestic protection.

On its face § 924(c) reaches the use of a firearm "in relation to *any* ... drug trafficking crime," not only to a "predicate [drug] offense" charged against the defendant. Presumably, therefore, if we were writing on a clean slate, we might hold that the "related" drug trafficking crime need not have been charged so long as all of its elements are proved beyond a reasonable doubt. *Cf.* Op. at 1116–17 (stating that jury could reasonably infer that money was proceeds of prior drug distributions). Our circuit, however, in *Bruce* and *Derr* ignored ordinary rules of construction and adopted a cramped interpretation of § 924(c). Were it not for those cases I would gladly join the majority in upholding the § 924(c) conviction.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

No. 94-

ROLAND J. BAILEY, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

CERTIFICATE OF SERVICE

I, James G. Duncan, counsel for Roland J. Bailey, and a member of the Bar of this Court, hereby certify that on this 28th day of December, 1994, one copy of the Petition for a Writ of Certiorari in the above-captioned case was served by messenger on the following counsel for the United States of America:

Honorable Drew S. Days, III
Solicitor General
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Washington, D.C. 20530

I further certify that the following party required to be served has been served:

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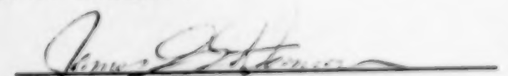

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ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

No. 94- 94-7448

ROLAND J. BAILEY, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

Supreme Court, U.S.
FILED
1994
OFFICE OF THE CLERK

CERTIFICATE OF SERVICE

I, James G. Duncan, counsel for Roland J. Bailey, and a member of the Bar of this Court, hereby certify that on this 28th day of December, 1994, one copy of the Motion for Leave to Proceed In Forma Pauperis in the above-captioned case was served by messenger on the following counsel for the United States of America:

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ORIGINAL

Nos. 94-7448, 94-7492

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Supreme Court, U.S.
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MAR 6 1995
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

RONALD J. BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA

CANDISHA S. ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was sufficient to support petitioners' convictions for using a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No. 94-7448

RONALD J. BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 94-7492

CANDISHA S. ROBINSON,

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (94-7448 Pet. App. 1a-22a) is reported at 36 F.3d 106. The opinion of the panel in 94-7448 (94-7448 Pet. App. 24a-32a) is reported at 995 F.2d 1113. The opinion of the panel in 94-7492 (94-7492 Pet. App. 22a-36a) is reported at 997 F.2d 884. The opinion of the district court in 94-7492 (94-7492 Pet. App. 37a-41a) is reported at 779 F. Supp. 606.

JURISDICTION

The judgment of the en banc court of appeals was entered on October 4, 1994. The petition for a writ of certiorari in No. 94-7448 was filed on December 28, 1994. The petition for a writ of certiorari in No. 94-7492 was filed on December 29, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioner Bailey was convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 8412(a); possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g); and using or carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1). He was sentenced to 51 months' imprisonment on the cocaine possession charge, a concurrent 51 month term on the felon in possession charge, and a consecutive 60-month term on the using or carrying a firearm charge.

Following a jury trial in the United States District Court for the District of Columbia, petitioner Robinson was convicted of distribution of cocaine base, in violation of 21 U.S.C. 841(a)(1); possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); commission of narcotics offenses within 1000 feet of a school, in violation of 21 U.S.C. 860(a); maintenance of a building for the purpose of manufacturing, storing, distributing, or using cocaine base, in violation of 21 U.S.C. 856(a); and using or carrying a firearm during and in relation to a drug trafficking

offense, in violation of 18 U.S.C. 924(c)(1). She was sentenced to concurrent 57 month terms of imprisonment on the narcotics counts and a consecutive 60-month term on the using or carrying a firearm count. 94-7492 Pet. App. 24a.

1. a. In May 1989, petitioner Bailey was stopped by two District of Columbia Metropolitan Police Officers when they noticed that he was driving a vehicle that lacked a license plate and inspection stickers. When Bailey, who failed to produce a driver's license, complied with the officers' instructions to get out of his vehicle, they observed him attempt to conceal an item between the seat and front console. When one of the officers moved the driver's seat back, a white plastic packet of cocaine and a brown leather pouch fell from between the seat and console to the floor of the vehicle. The pouch contained 26 additional packets of cocaine. The officers also discovered a single round of live ammunition. 94-7448 Pet. App. 3a, 25a; Bailey Gov't C.A. Br. 3-4.

After placing Bailey under arrest, the officers conducted a search of the trunk of his vehicle. Among several bags of clothing, they discovered a loaded nine millimeter Smith and Wesson pistol and $3,216 in currency concealed in a vest jacket. 94-7448 Pet. App. 3a; Bailey Gov't. C.A. Br. 3-4.

b. At trial, an experienced narcotics detective testified that the cocaine found in Bailey's car was packaged for sale in $50 bags. He also testified that drug dealers frequently carry weapons "not only to protect themselves but [also] to protect their assets, drugs and money." 94-7448 Pet. App. 26a.

Bailey was subsequently convicted, inter alia, of using or carrying a firearm, in violation of 18 U.S.C. 924(c)(1). That section provides in pertinent part:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years.

c. A divided panel of the court of appeals affirmed, rejecting Bailey's claim that the evidence was insufficient to permit a jury to find that he used a firearm during and in relation to a drug trafficking offense. 94-7448 Pet. App. 24a-32a. The majority concluded that, in order to support such a conviction, all that was required was proof that the firearm facilitated the drug trafficking offense in some way. It reasoned that, even though the pistol was not within Bailey's reach while he was driving his vehicle, a factfinder could reasonably infer that he used the loaded weapon to protect the cash in the trunk and to protect a prior distribution of cocaine. Id. at 29a-30a.

Judge Ginsburg dissented. 94-7448 Pet. App. 30a-32a. He stated that, if prior circuit precedent were not binding, he would "gladly join the majority in upholding the § 924(c) conviction." Id. at 32a. But in his view, prior circuit precedent required reversal of the conviction in Bailey's case. Id. at 30a-31a.

2. a. On July 15, 1991, an undercover District of Columbia police officer approached petitioner Robinson's sister, Veloria,

and stated that he wished to purchase a quantity of crack cocaine. Veloria took the officer to a Northeast Washington apartment and knocked at the door. Robinson responded to the knock and asked the undercover officer what he wanted. The officer said he wanted a "twenty." He then observed Robinson retrieve a rock of crack cocaine from a bedroom, which she sold him for $20 in marked money. The following evening, the undercover officer returned to Robinson's apartment and was sold a quantity of cocaine by Kwarme Parker who stated that he lived in the apartment with her. 94-7492 Pet. App. 23a.

A half hour later, the police executed a search warrant at the apartment. Inside a locked trunk in a bedroom closet, the police found a .22 caliber derringer-type pistol and holster, a tax return signed by Robinson, a letter from Robinson's employer, two rocks of cocaine, the $20 in marked money that the officer had given Robinson on the previous day, and $42.80 in other cash. Other documents in other parts of the bedroom, including a lease, confirmed that Robinson lived in the apartment. As in Bailey, Robinson was charged, inter alia, with using and carrying a firearm -- the .22 caliber derringer -- during and in relation to a drug trafficking offense. 94-7492 Pet. App. 23a.

b. At trial, a narcotics detective testified that the cocaine in the locked trunk had a street value of $700 to $800 in its present form, or a $1400 value if divided into $20 pieces. He also testified that the .22 pistol was commonly known as a "second gun" that a drug dealer would hide on his person for use until he could

reach his "real" gun. He added that guns are generally used by drug dealers to protect themselves from rivals, the police, and employees within the organization. 94-7492 Pet. App. 23a.

Testifying in her own behalf, Robinson acknowledged that she had leased the apartment and owned the trunk in which the narcotics and pistol were found. Although she also admitted that she knew that Parker was selling drugs, she disclaimed knowledge of the drugs or the pistol found in her footlocker. 94-7492 Pet. App. 23a.

The district court denied Robinson's motion for a judgment of acquittal, ruling that the evidence was sufficient to establish that she had used or carried a firearm during and in relation to a drug trafficking offense, in violation of Section 924(c)(1). 94-7492 Pet. App. 37a-41a. The court reasoned that the fact that Robinson's apartment "was a base for the distribution of crack cocaine permits the inference that the gun was used to facilitate the possession with intent to distribute." Id. at 41a. In the district court's view, because "the jury could legitimately infer that [Robinson] had access to the gun in the trunk and could use the gun to protect the stash of drugs and the proceeds of drug sales should the need arise," it did not matter that the trunk was kept locked. Ibid.

c. A divided panel of the court of appeals reversed Robinson's conviction for using and carrying a firearm during and in relation to a drug trafficking offense. 94-7492 Pet. App. 22a-36a. The court determined that Robinson's "possession of this

single, unloaded .22-caliber derringer found in a locked trunk in a bedroom closet falls significantly short of the type of evidence we have held to establish actual use under the statute." Id. at 26a. In the court's view, "mere proximity of a gun to drugs is not * * * sufficient to support a conviction under section 924(c) in this circuit." Id. at 28a.

Judge Henderson dissented. 94-7492 Pet. App. 29a-35a. In her view, the firearm facilitated Robinson's distribution of narcotics, because it protected both her and the drugs during sale transactions. Id. at 33a. In any event, she believed that the jury could reasonably find that the gun concealed in the apartment was used during and in relation to the ongoing offense of maintaining premises for the distribution of drugs. Id. at 34a.

3. a. The court of appeals granted rehearing en banc in both cases and affirmed the convictions under Section 924(c). 94-7448 Pet. App. 22a; 94-7492 Pet. App. 35a. A majority of the en banc court rejected the multi-factor weighing approach previously employed by the circuit for determining the sufficiency of the evidence in support of a Section 924(c)(1) conviction. In the court's view, that test resulted in an impermissible degree of appellate intrusion into the factfinding function of the jury. 94-7448 Pet. App. 6a-7a.

In reformulating the test for sufficiency, the court stated that Section 924(c)(1) requires two showings: that the defendant "use[d]" the firearm and that the use was "during and in relation to a drug trafficking offense." The court first explained the

"use" requirement. It rejected the view that "use" includes only "the paradigmatic uses of a gun, i.e., firing, brandishing, or displaying the gun during the commission of the predicate offense." 94-7448 Pet. App. 9a. Instead, the court held, "one uses a gun, i.e., avails oneself of a gun, whenever one puts or keeps the gun in a particular place from which one (or one's agent) can gain access to it if and when needed to facilitate a drug crime." Id. at 10a. Since "possession with the intent to distribute is a continuing offense," the court held that "the government need only prove that the defendant put or kept the gun in that place at some point while the defendant illegally possessed the drugs." Ibid.

Second, the court clarified the requirement that the use of the gun had to be "in relation to a drug trafficking offense." 94-7448 Pet. App. 10a. The court noted that the "in relation to" element requires only the "potential of facilitating" the predicate crime, not the actual furtherance of that crime. Ibid. Therefore, the court concluded, there is sufficient evidence for a jury to infer the "in relation to" element if "at some time during the commission of the predicate drug offense," the defendant "put or kept a firearm in a place where it would be proximate to and accessible from a place that is clearly connected to his drug trafficking (e.g., a place used to store, manufacture, or distribute drugs, or to keep the proceeds of drug transactions)." Id. at 11a. In such cases, the court concluded, the "jury may infer that the gun was being used to protect the drug trafficking operation, and was therefore being used in violation of §

924(c)(1)." Ibid.

Applying its standard to the cases before it, the court determined that in each case, the gun was proximate to the drugs or narcotics proceeds and was accessible when the drugs or proceeds were being handled. 94-7448 Pet. App. 12a-13a. The court held that the jury could therefore properly infer in each case that the defendant had placed the gun in that location in order to further the drug offenses or to protect the possession of the drugs, and that the gun had therefore been used "in relation to" a drug trafficking offense. Id. at 12a-13a.

b. Judge Wald filed a dissenting opinion. 94-7448 Pet. App. 13a-15a. In her view, the court's previous multifactor test provided a satisfactory standard for appellate review of Section 924(c)(1) convictions. Id. at 13a. Moreover, she stated, the term "use" requires some type of activity by a defendant "who is in the immediate vicinity of the weapon, and not mere placement of the weapons near the drugs." Id. at 15a. She stated that "[w]here evidence of ready access to a gun by the defendant guarding or distributing the drugs exists," the jury can infer "that such access is an intrinsic part of the criminal drug trafficking act." Ibid. But, under her view, the evidence would be insufficient to sustain conviction for using a firearm where the defendant himself lacks ready access to the firearm. Ibid. Judge Wald concluded that there was sufficient evidence to sustain Bailey's conviction because his gun was accessible to him, but insufficient evidence to sustain Robinson's conviction because "there was proof only of

drugs and an unloaded gun in a locked trunk in a bedroom closet." Ibid.

Judge Williams, joined by Judges Silberman and Buckley, also filed a dissenting opinion. 94-7449 Pet. App. 15a-21a. In his view, the term "uses" connotes "actual service from the weapon in completing an unlawful act," such as by firing it, intimidating opponents, displaying or brandishing it, or using it as an item of exchange. Id. at 17a. Under his view, the term "uses" does not embrace employing the gun to embolden the defendant or to protect his criminal activity; Judge Williams believed "the only function [of a gun employed in those ways] is to make successful completion [of the crime] more probable under contingencies that have not arisen." Ibid. Applying his standard, Judge Williams would have reversed the convictions in both Bailey's case and Robinson's case. Id. at 21a.

Judge Silberman filed a brief dissenting opinion, in which he stated that it was "unfortunate" that the majority of the en banc court had not "confront[ed] fully the analysis set forth in" Judge Williams' dissenting opinion. 94-7448 Pet. App. 21a.

ARGUMENT

1. a. Petitioners contend (94-7448 Pet. 9-16; 94-7492 Pet. 12-13) that the decision of the court of appeals conflicts with decisions of a number of other circuits. To support that claim, petitioners observe (94-7448 Pet. 8, 16; 94-7492 Pet. 12), that, in Langston v. United States, 113 S. Ct. 361 (1992), two Members of this Court dissented from a denial of certiorari because, in their

view, there was a conflict among the circuits concerning the proper test for applying Section 924(c)(1) to drug trafficking offenses. Id. at 362 (White, J., joined by Thomas, J.). The results in different circuits are not in conflict, and any perceived inconsistency in the approach to this issue has abated, due, in part, to the decision of the court below.

This Court explained in Smith v. United States, 113 S. Ct. 2050, 2055 (1993), that the language of Section 924(c) "sweeps broadly, punishing any 'us[e] of a firearm, so long as the use is 'during and in relation to' a drug trafficking offense." As the Court noted, "the word 'use' is 'expansive' and extends even to situations where the gun is not actively employed." Smith, 113 S. Ct. 2054 (citing United States v. Long, 905 F.2d 1572, 1577 (D.C. Cir.), cert. denied, 498 U.S. 948 (1990) (Thomas, J.)). As a result, the regional courts of appeals, including the court of appeals in this case, have agreed that the term "use" embraces not only the active employment of a firearm during a drug transaction, but facilitation of a drug trafficking offense by the placement of a firearm so as to provide protection to the defendant, his narcotics cache, or the proceeds of drug trafficking, should the need arise.[1] Thus, whenever a firearm is placed near the drugs or

[1] See, e.g., United States v. McFadden, 13 F.3d 463, 465 (1st Cir. 1994) (mere presence of arms for the protection of drugs for sale constitutes use); United States v. Paulino, 13 F.3d 20, 26 (1st Cir. 1994) (evidence sufficient to support conviction where "gun was kept in the apartment to be 'available for use' during and in relation to the ongoing drug peddling"); United States v. Fermin, 32 F.3d 674, 678 (2d Cir. 1994) (Section 924(c) conviction will be sustained "if the evidence shows that a defendant strategically placed a weapon so as to enable ready access to it

drug proceeds and the firearm was accessible to the defendant at some time during his commission of the drug offense, a jury may reasonably infer that the firearm was "use[d] * * * in relation to" the offense. The court of appeals correctly noted that its adoption of that standard brought it into accord with the other

during a drug transaction"), cert. denied, No. 94-7407 (Feb. 21, 1995); United States v. Theodoropoulos, 866 F.2d 587, 596-597 (3d Cir. 1989) ("presence in plain view of a loaded firearm * * * is evidence that conspirators may have felt some need for security from which a jury could infer that the weapon was an integral part of [drug trafficking] conspiracy 'used' therein"); United States v. Nelson, 6 F.3d 1049, 1054 (4th Cir. 1993) (firearms in close proximity to cache of narcotics permitted inference "that the firearms were present for protection and to facilitate the likelihood of success of the operation"), cert. denied, 114 S. Ct. 2142 (1994); United States v. Pace, 10 F.3d 1106, 1117 (5th Cir. 1993) ("'Use' does not require * * * discharging or brandishing of the weapon;" government "may meet its burden by simply showing that the weapons facilitated, or could have facilitated, the drug trafficking offense"), cert. denied, 114 S. Ct. 2180 (1994); United States v. Wilson, 27 F.3d 1126, 1133 (6th Cir.) ("within the province of the jury" to conclude that weapon found in hotel room with cocaine "was there to protect the * * * cocaine" and that defendant was therefore guilty of violating Section 924(c)), cert. denied, 115 S. Ct. 452 (1994); United States v. Edwards, 36 F.3d 639, 644 (7th Cir. 1994) ("[e]vidence that a firearm was in proximity and available for protection during the course of a narcotics offense is sufficient" to support conviction on a Section 924(c) count); United States v. Quintanilla, 25 F.3d 694, 700 (8th Cir.) ("To support a conviction under section 924(c)(1), the government need only establish that a firearm was present and available for use."), cert. denied, 115 S. Ct. 457 (1994); United States v. Martinez, 967 F.2d 1343, 1346 (9th Cir. 1992) (Section 924(c) requires neither literal use nor open display; use requirement is satisfied if, due to its proximity to drugs, gun is "available" to defend the cache); United States v. Baker, 30 F.3d 1278, 1279 (10th Cir. 1994) ("We presume a nexus between a firearm and a drug trafficking offense when an individual with ready access to a firearm is involved in such an offense."), cert. denied, 115 S. Ct. 273 (1994); United States v. Poole, 878 F.2d 1389, 1393 (11th Cir. 1989) ("We agree that the presence of weapons in a location defendant used to distribute a significant quantity of illegal drugs is sufficient to submit to the jury the issue of whether defendant used the firearms in connection with a drug trafficking crime.").

circuits. 94-7448 Pet. App. 8a.

It is true that courts of appeals have on occasion reversed convictions under Section 924(c) on the ground that the evidence was insufficient to sustain the jury's verdict. But those decisions invariably rest on the court's conclusion that the government failed to prove proximity and accessibility or that the government failed to prove some other element of its case. They do not conflict with the decision of the court of appeals in this case.

For example, petitioners contend that the decision of the court of appeals conflicts with the decisions of the First and Second Circuits in United States v. Torres-Maldonato, 14 F.3d 95, 101-102 (1st Cir.), cert. denied, 115 S. Ct. 193 (1994), and United States v. Feliz-Cordero, 859 F.2d 250, 254 (2d Cir. 1988). See 94-7448 Pet. 10-11. In Torres-Maldonato, however, the First Circuit reversed the defendant's conviction for a violation of Section 924(c) because the government failed to present any evidence linking a particular defendant either to the firearm at issue or to the hotel room in which it was found. The court neither rejected the analysis adopted by the D.C. Circuit in this case nor reached a result that conflicts with the result in this case.[2] To the contrary, the First Circuit has recently reaffirmed its view that

[2] For the same reason, petitioner errs in contending (94-7448 Pet. 13) that there is a conflict with the Tenth Circuit's decision in United States v. Matthews, 942 F.2d 779, 784 (10th Cir. 1991). There, the court reversed the defendant's conviction because there was no evidence that the defendant, a visitor to a residence where a drug transaction was to take place and guns were found, knew of the presence of weapons or handled them.

strategic placement of a firearm for possible employment during a drug transaction is sufficient to sustain a conviction under Section 924(c)(1). See United States v. Fermin, 32 F.3d at 678. See also United States v. Hadfield, 918 F.2d 987, 998 (1st Cir. 1990) (jury may conclude defendant used firearm if it "is found in close proximity to a room or rooms in which drug distribution, processing, or storage occurs"), cert. denied, 500 U.S. 936 (1991).

In Feliz-Cordero, the Second Circuit similarly held that a conviction may be sustained under Section 924(c)(1) if the "circumstances surrounding the possession of a firearm in a place where a drug transaction takes place suggest that it was strategically located so as to be quickly and easily accessible for use during such a transaction." 859 F.2d at 254. The court reversed the defendant's Section 924(c) conviction only because "on the evidence presented there [was] no basis to conclude that the gun would have been quickly accessible" where it was located in the bedroom dresser drawer of an apartment that elsewhere contained drug paraphernalia. That fact-specific conclusion does not conflict with the decision in petitioners' cases.[3] Here, the

[3] Nor does the Second Circuit's recent decision in United States v. Melendez, 1995 WL 29818 (2d Cir. Jan. 26, 1995), conflict with the decision below. In Melendez, a machinegun, some heroin, and a drug record were jettisoned from the window of the defendant's girlfriend's apartment after the police knocked on the door to execute a warrant to arrest him. The court of appeals stated that Section 924(c) is satisfied, "for example, where the proof establishes that the defendant intended to make use of the weapon by having it available for use should it be needed during a drug transaction." 1995 WL at *5. The court held, however, that "[b]ecause the gun was seized in [defendant's] girlfriend's apartment, where no drug transactions were shown to occur, and because the gun was not in a place easily accessible to [the

firearms were placed within easy reach of a cache of narcotics, the apparent proceeds of a drug trafficking operation, or both, and they were therefore were readily accessible for protection of the persons engaged in the drug trafficking offenses.

Nor does the decision below conflict with the holdings of several courts of appeals that the mere presence of a firearm at the time of arrest cannot support an inference that the firearm was used a some earlier time during a predicate drug trafficking offense. See 94-7448 Pet. 11-12. In United States v. Clemis, 11 F.3d 597, 602 (6th Cir. 1993), cert. denied, 114 S. Ct. 1858 (1994), for example, the Sixth Circuit reversed a Section 924(c) conviction in a case in which a firearm was discovered at a location where there had been no evidence of drug trafficking for several months and no evidence linked the weapon to any of the defendant's earlier drug transactions. In United States v. Lasanta, 978 F.2d 1300, 1308 (2d Cir. 1992), the evidence showed only that the defendant had possession of a firearm at the time of his arrest following completion of a narcotics-related meeting; the court explained that "[t]here is insufficient evidence to conclude that at the time of [defendant's] arrest, he was involved in specific drug-related activity." The D.C. Circuit did not disagree

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defendant] in the event a contingency arose or for him to make his escape during a drug trafficking offense," the evidence was insufficient to establish a violation of Section 924(c). Ibid. (emphasis added). While the dissenting judge took issue with that conclusion on the particular facts of the case, see id. at *12-*14 (Van Graafeiland, J., dissenting), the Second Circuit's reliance on fact that the gun was not "easily accessible" is consistent with the test adopted by the D.C. Circuit.

with either of those holdings; it merely held that, where the predicate drug trafficking offense is a continuing one, such as possession of narcotics with intent to distribute, evidence that a firearm was positioned to facilitate drug trafficking during the course of the offense is sufficient to support a conviction. See 94-7448 Pet. App. 10a.

Petitioners also claim that decisions of other circuits conflict with the D.C. Circuit's holding that a jury may infer use from accessibility of a firearm during a drug trafficking operation. 94-7448 Pet. 12-13. That claim is mistaken. In United States v. Theodoropoulos, 866 F.2d 587 (3d Cir. 1989), the Third Circuit held that a loaded shotgun located inside an apartment and accessible to drug traffickers operating at that location constituted evidence that the weapon was "used" during and in relation to a drug trafficking conspiracy. Id. at 597. It also held, however, that three other firearms concealed in a trash can on the porch outside the building did not satisfy the requirement of proximity and accessibility. Id. at 597. That holding is consistent with the D.C. Circuit's holding here permitting the jury to infer use where firearms are "accessible from a place that is clearly connected to * * * drug trafficking." 94-7448 Pet. App. 11a.

Similarly, there is no reason to believe that the Tenth Circuit's standard is materially different from that adopted by the D.C. Circuit. In United States v. Conner, 972 F.2d 1172, 1173-1174 (10th Cir. 1992), the Tenth Circuit held that, although "mere

access to a firearm" is insufficient to support a conviction under Section 924(c)(1), the evidence is sufficient where it "prove[s] that the defendant intended the weapon to be available for use during the drug transaction." The court therefore upheld a conviction where the jury could infer from the location of a firearm directly above a commercial quantity of amphetamines that the defendant intended the weapon to be readily available for use during a drug transaction. That holding is consistent with the D.C. Circuit's proximity and accessibility test.

2. Petitioners also claim that the decision of the court of appeals is incorrect. That contention lacks merit.

a. Petitioners first argue that the court's test fails to draw a line between "use" of a firearm, which is prohibited by Section 924(c), and mere "possession," which is not. 94-7448 Pet. 18-26. The court of appeals correctly held, however, that, where the defendant "put or kept a firearm in a place where it would be proximate to and accessible from a place that is clearly connected to his drug trafficking, (e.g., a place used to store, manufacture, or distribute drugs, or to keep the proceeds of drug transactions," the "jury may infer that the gun was being used to protect the drug trafficking operation." 94-7448 Pet. App. 11a. An important use of a firearm is to provide protection to an individual and to embolden that individual to undertake activities that would otherwise be too dangerous. That form of "use" is distinct from the mere possession of a firearm that has no relation to the offense in question. Of course, even when a gun is nearby and

accessible, the jury may refuse to draw the inference that it "was being used to protect the drug trafficking operation." Ibid. The parties may also introduce relevant evidence and present argument on that question. But once proximity and accessibility has been shown, it is for the jury -- not the district court or court of appeals -- to decide whether that inference should be drawn.

b. Petitioners argue that the court of appeals' broad construction of the term "use" renders superfluous Section 924(c)'s prohibition against "carr[ying]" a firearm during and in relation to a crime of violence or drug trafficking crime. 94-7448 Pet. 23-25. As applied to "crimes involving possession of drugs," which are "furtive crimes" in which "[s]tealth is essential," 94-7448 Pet. App. 10a n.1, it may be that a person who "carries" a firearm in relation to the offense (i.e., for his protection) will also be found to have "use[d]" the firearm for that purpose. But the same analysis may not be applicable to all of the predicate "crimes of violence" covered by Section 924(c). See 94-7448 Pet. App. 10a n.1.

In any event, the overlap between "uses" and "carries" is the result of Congress's intent to make sure that both terms were interpreted broadly. As originally enacted in 1968, the statute applied to anyone who "uses a firearm to commit any felony" under federal law and to anyone who "carries a firearm unlawfully during the commission of" any such felony. Pub. L. No. 90-618, § 102, 82 Stat. 1224. Under that formulation, an "unlawful[] carr[ying]" of a firearm "during a felony" could easily be distinct from a "use"

of a firearm "to commit" the felony. In 1984, however, Congress amended the statute to broaden both the "use" and "carries" prongs, omitting the requirement that the firearm be used "to commit any felony" and the requirement that it be carried "unlawfully," while adding the much more general "during and in relation to" element applicable to both prongs. Pub. L. No. 98-473, § 1005(a), 98 Stat. 2138-2139. See S. Rep. No. 225, 98th Cong., 2d Sess. 313-314 & n.10. It is hardly surprising that the result of that change, which plainly expanded the reach of both prongs, was to create a very substantial overlap between "use" and "carry."

c. Finally, petitioners argue (94-7448 Pet. 22-23) that, if Congress had intended the term "uses" in Section 924(c) to embrace the concealment of a firearm in preparation for possible active use in the event of a contingency, it would not, in the adjacent forfeiture provision, have distinguished between firearms "used" and those "intended to be used" in the commission of certain enumerated crimes. That distinction, petitioners contend, demonstrates that, when Congress intended a provision to embrace both "use" and "intent to use," it specifically said so.

The forfeiture provisions of Section 924(d), however, reach both future uses of firearms and intended uses of firearms in future offenses. For example, forfeiture under Section 924(d)(3)(C) applies to the use or intended use of firearms in the offense of shipping a firearm while engaged in the business of unlicensed dealing in firearms. See 18 U.S.C. 922(a)(1). A firearm shipped in the course of such a business would be "used" in

the commission of such an offense, whereas a firearm in the dealer's inventory awaiting shipment would be one "intended to be used" in the commission of a future crime. See United States v. One Assortment of Seven Firearms, 632 F.2d 1276, 1278-1279 (5th Cir. 1980). The terms "used" and "intended to be used" thus apply to different firearms, and Congress therefore had reason to employ both terms in defining the class of property subject to forfeiture. In contrast, Section 924(c) requires actual (not future) commission of the predicate crime and actual (not future) use.[4] The language of Section 924(d) therefore provides no reason for rejecting the D.C. Circuit's interpretation of Section 924(c).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1995

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[4] For example, if a drug dealer purchased a firearm for the purpose of protecting his drug operations, but was presently storing the firearm at a remote and inaccessible location, that firearm would be subject to forfeiture under Section 924(d), although it would not be the basis for a prosecution under Section 924(c).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

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RONALD J. BAILEY, PETITIONER	)	
	)	
v.	)	NO. 94-7448
	)	
UNITED STATES OF AMERICA	)	
CANDISHA S. ROBINSON, PETITIONER	)	
	)	
v.	)	NO. 94-7492
	)	
UNITED STATES OF AMERICA	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first-class mail, postage prepaid, this 6th day of March 1995.

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March 6, 1995

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ROLAND J. BAILEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

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United States v. *McFadden*,
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Statute

18 U.S.C. § 924(c) . . . . . *passim*

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No. 94-7448

ROLAND J. BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

The Solicitor General labors both to deny the existence of a conflict in the circuits and to defend on the merits the decision of the court of appeals. He does not succeed in either effort.

1. If Roland J. Bailey's arrest had occurred in New York City instead of Washington, D.C., his conviction under 18 U.S.C. § 924(c)(1) would have been reversed. The only significant facts supporting Bailey's conviction were that he possessed a gun, cash, and drugs simultaneously, and the gun -- though relatively inaccessible in the locked trunk of a moving car -- "was found in the same place as the cash (namely, the trunk) and in the same car as the drugs." Pet. App. 12a. In a line of cases beginning with *United States* v. *Feliz-Cordero*, 859 F.2d 250, 254 (2d Cir. 1988), and continuing at least through *United States* v. *Melendez*, No. 93-1087, 1995 WL 29818 (2d Cir. Jan. 26, 1995), the Second Circuit has reversed Section 924(c) convictions in cases that were far better candidates than Bailey's for inferring use of a firearm during and in relation to a drug offense.[1] Conversely, the conviction in each of those cases would have had to be upheld if the Second Circuit followed the wooden, two-factor approach that a 5-4 majority of the en banc D.C. Circuit adopted in the opinion below, and that the D.C. Circuit has since applied in a mechanical fashion to uphold Section 924(c) convictions.[2] To resolve these and the other circuit conflicts identified in the petition, the Court should grant certiorari.

The Solicitor General nevertheless argues that "[t]he results in different circuits are not in conflict, and any perceived inconsistency in the approach to this issue has abated, due, in part, to

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[1] In *Feliz-Cordero*, the police electronically recorded a conversation in a particular apartment in which the defendants discussed their trafficking in "crack" and the gun that one of them kept. On executing a search warrant for that apartment, the police discovered a .38-caliber Smith & Wesson revolved loaded with five rounds of ammunition in a dresser drawer, and cocaine, drug records, $11,000 in cash, and a beeper elsewhere in the room. 859 F.2d at 252. The Second Circuit held that "[t]his is not sufficient evidence to sustain a conviction, even in light of our recognition of the frequent connection between firearms and narcotics trafficking." *Id.* at 254. In *Melendez*, a divided court reversed a conviction for the defendant's alleged use of a machine gun, despite proof that the defendant was a key player in a massive heroin distribution ring (1995 WL 29818 at *2), proof that he participated in shootings and armed searches (*id.* at *3), and the majority's recognition that "[i]t would be naive to think defendant possessed such a lethal weapon for some innocent purpose" (*id.* at *1).

[2] See, *e.g.*, *United States* v. *Lindsey*, No. 90-3173, 1995 WL 56693 at *4 (D.C. Cir. Feb. 14, 1995) (presence of drugs and guns in apartment meets *Bailey* "proximity" and "accessibility" tests); *United States* v. *Johnson*, No. 93-3149, 1995 WL 43787 (D.C. Cir. Feb. 7, 1995).

the decision of the court below." Br. in Opp. 11. That assertion is wrong.

The clearest of the several conflicts is between the decision below and many decisions of the Second Circuit. Taking language from *United States* v. *Melendez*, *supra*, out of context, however, the government tries to show that the Second Circuit's reversal in that case was consistent with the D.C. Circuit's test. Br. in Opp. 14 n.3 But the Second Circuit's holding that the machine gun in *Melendez* was not "easily accessible" (1995 WL 29818 at *5) shows that there is a world of difference between the Second Circuit's approach and the D.C. Circuit's. The proof in *Melendez* showed that the gun was in *the same apartment* as drugs and drug records when the police arrived to arrest the defendant *in that apartment*. There was also direct proof that a co-conspirator had given the gun to the defendant. *Id.* at *3. The D.C. Circuit under its proximity-and-accessibility test would certainly affirm a conviction on these facts. But the Second Circuit found it dispositive that the proof showed drug transactions elsewhere, not in the apartment. *Id.* at *5.[3] In Bailey's case, of course, no specific drug transaction was proved *anywhere*. Thus, the Second Circuit would have reversed Bailey's conviction. See also *United States* v. *Lasanta*, 978 F.2d 1300, 1308-1309 (2d Cir. 1992).

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[3]By contrast, in *United States* v. *Fermin*, 32 F.3d 674, 678 (2d Cir. 1994), cert. denied, 63 U.S.L.W. 3627 (Feb. 21, 1995), "[a]mple evidence demonstrated that [the defendant] engaged in numerous narcotics transactions from the office where the gun was found."

Similarly, the decision below cannot be squared with *United States* v. *Feliz-Cordero*, *supra*, despite the Solicitor General's effort (Br. in Opp. 14) to seize on the language "quickly accessible" in the Second Circuit's opinion. The Second Circuit in *Feliz-Cordero* refused to do exactly what the D.C. Circuit majority agreed to do in the decision below: "presume[]" from the bare location of a firearm that it bore the necessary relation to a narcotics crime. 859 F.2d at 254. The Second Circuit demanded either "[p]roof of a transaction" or "circumstances surrounding the presence of a firearm *in a place where drug transactions take place* suggest[ing] that it was strategically located." *Ibid.* (emphasis added). Neither factor was proved in Bailey's case.[4]

The government also is unsuccessful in its effort to distinguish conflicting decisions of other circuits. For example, the government tries to distinguish *United States* v. *Clemis*, 11 F.3d 597, 602 (6th Cir. 1993), cert. denied, 114 S. Ct. 1858 (1994), on the ground that "a firearm was discovered at a location where there had been no evidence of drug trafficking for several months and no

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[4]Among the other courts of appeals, the Tenth Circuit probably aligns most closely with the Second. In *United States* v. *Matthews*, 942 F.2d 779, 783 (10th Cir. 1991), the court expressly endorsed the Second Circuit's *Feliz-Cordero* decision and noted that "section 924(c) requires more than mere access to a firearm." The Solicitor General tries to distinguish *Matthews* on the ground that "there was no evidence that the defendant * * * knew of the presence of weapons or handled them." Br. in Opp. 13 n.2. The Solicitor General is incorrect. The firearms were "in plain view" and "readily accessible" to the defendant. 942 F.2d at 783. The defendant's conviction would certainly have been upheld under the D.C. Circuit's test. For a more recent Tenth Circuit decision reversing a Section 924(c) conviction that the D.C. Circuit would likely have upheld, see *United States* v. *Jones*, No. 93-4240, 1995 WL 82685 at *3-*5 (Feb. 27, 1995).

evidence linked the weapon to any of the defendant's earlier drug transactions." Br. in Opp. 15. But the exact same things could be said of Roland Bailey's firearm: there was no evidence of actual drug trafficking -- as opposed to the offense for which Bailey was convicted, *possession* with *intent* to distribute -- at the firearm's location (Bailey's car), or anywhere else for that matter, and certainly no evidence linked the weapon to earlier drug transactions, because no such transactions were proven. Moreover, the Sixth Circuit reversed Clemis's conviction even though "currency used in a prior controlled drug purchase was found in the house" where the firearm was discovered, 11 F.3d at 602, whereas the D.C. Circuit has made it clear that proximity to and accessibility from the place where drug proceeds are stored is enough.[5]

The Solicitor General's claim that the conflict in the circuits "has abated, due, in part, to the decision of the court below" (Br. in Opp. 11) is a mere makeweight argument. As Justices White and Thomas pointed out two and a half years ago,[6] the principal -- though not the only -- conflict is between the Second Circuit's *Feliz-Cordero* line of cases and the decisions of other

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[5]See Pet. App. 11a ("Whenever there is sufficient evidence for a jury to find that the defendant at some time during the commission of the predicate drug offense put or kept a firearm in a place where it would be proximate to and accessible from a place that is clearly connected to his drug trafficking (*e.g.*, **a place used to * * * keep the proceeds of drug transactions**), the jury may also infer that the gun was being used to protect the drug trafficking operation, and was therefore being used in violation of § 924(c)(1).") (emphasis added).

[6]*Langston* v. *United States*, 113 S. Ct. 361, 362 (1992) (dissent from denial of certiorari).

courts that take a very broad approach (a camp into which the D.C. Circuit now falls, by a closely divided vote). A D.C. Circuit decision cannot make a conflict with the Second Circuit "abate," nor -- as decisions like *Melendez* show -- has the Second Circuit retreated from its turf. Moreover, as we demonstrated in the petition, the D.C. Circuit's proximity-and-accessibility test now places that court in conflict with *many* other circuits, because *no* other court has boiled Section 924(c) down to those two factors, to the exclusion of all others, and *several* courts have reversed convictions that the D.C. Circuit's simple test would uphold.[7]

The denial of certiorari in 1992 in *Langston*, despite a conflict in the circuits, may have been attributable to the fact-intensive nature of most Section 924(c) cases and the difficulty for this Court of framing rules of general applicability in resolving fact-bound cases. Now, however, the judges of the D.C. Circuit -- both majority and dissenting -- have formulated general rules to govern the run of Section 924(c) cases, thereby framing the issues in a way that makes them suitable candidates for resolution by this Court.[8] This case presents the best vehicle the

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[7]Some courts, however, have simply given up on the exercise of distinguishing "use" from mere possession. See Pet. 8 n.4, 9 n.5; Pet. App. 19a n.3.

[8]The Solicitor General's defense of the merits of the decision below (Br. in Opp. 17-20) relies on not a single *fact* of either Bailey's or Robinson's case, but is instead, in its entirety, a discussion of the *legal boundaries* of "use" of a firearm. Thus, the text of the Solicitor General's own brief in opposition belies his attempt on the Question Presented page (Br. in Opp. I) to depict this as a mere sufficiency case. As the D.C. Circuit majority itself put it, "[i]n form the dispute between the parties is little more than a disagreement over the evidence necessary to

Court is ever likely to have for resolution of the recurring circuit conflicts that plague Section 924(c) cases, which are a staple of the diet of the federal courts of appeals. And, as we have shown in the petition and in this reply brief, and contrary to the government's assertion, those conflicts show absolutely no sign of abating.

2. The Solicitor General defends the decision below on the merits (Br. in Opp. 17-20) but in so doing inadvertently proves that the decision below *cannot* possibly be correct. The Solicitor General concedes that "Section 924(c) requires actual (not future) commission of the predicate crime *and actual (not future) use*" of the firearm. Br. in Opp. 20 (emphasis added). Yet the entire thrust of the opinion below is that *actual possession* for *future* use will suffice.

For example, the D.C. Circuit majority insisted that "a gun placed in a drawer beside one's bed for fear of an intruder would, in common parlance, be a gun 'used' for domestic protection." Pet. App. 9a. The majority held that Section 924(c) is violated "whenever one puts or keeps the gun in a particular place from which one * * * can gain access to it *if and when needed to facilitate a drug crime*." Pet. App. 10a (emphasis added). And -- in perhaps its most obvious invocation of future as opposed to present, actual use -- the majority declared that "the gun need only 'ha[ve] *the potential* of facilitating' the drug trafficking offense." Pet. App. 11a

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sustain a § 924(c) conviction * * * [but in substance] this case is about what constitutes use, as opposed to mere possession, of a firearm." Pet. App. 5a.

(quoting *Smith* v. *United States*, 113 S. Ct. 2050, 2059 (1993)). If one is going to attempt to distinguish actual from future use -- as the Solicitor General concedes Section 924(c) does -- then these forward-looking scenarios surely must all constitute mere future use. Yet all of them are swept within the D.C. Circuit's broad proximity-and-accessibility test, a test that virtually abandons all pretense of distinguishing actual from future use.

In an effort to escape from this embarrassment, the Solicitor General drops a footnote in which he asserts that a firearm avowedly purchased to protect drug operations "would not" be the subject of a Section 924(c) prosecution if the owner was "presently storing the firearm at a remote and inaccessible location." Br. in Opp. 20 n.4. If the Solicitor General means to suggest that a Section 924(c) conviction would be reversed based on his hypothetical facts, it is not at all clear that the D.C. Circuit agrees.[9] But, more fundamentally, the line the Solicitor General would draw between accessible and inaccessible guns is not the line drawn by the statute, which distinguishes "use" from mere possession. As Judge Williams (joined by Judges Silberman and Buckley) pointed out in

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[9]See Pet. App. 10a ("we *hold* that one uses a gun, i.e. avails oneself of a gun, and therefore violates the statute, whenever one puts or keeps the gun in a particular place from which one * * * can gain access to it if and when needed to facilitate a drug crime") (emphasis added). Presumably, the reference in the Solicitor General's footnote to "presently storing" the gun in a remote location does not mean storing it where even its owner *cannot* access it; otherwise, the Solicitor General's hypothetical example simply describes a species of irrational conduct that does not exist in the real world.

dissent, the majority below "has in effect diluted 'use' to mean simply possession with a floating intent to use." Pet. App. 16a.

As Judge Williams' dissent persuasively demonstrates, and for additional reasons discussed in *United States* v. *McFadden*, 13 F.3d 463, 466-469 (1st Cir. 1994) (Breyer, C.J., dissenting), and in the petition, "use" in Section 924(c) should be construed to mean *active* use and not mere non-accidental possession nearby drugs. Congress did not write Section 924(c) to reach possession, even purposeful possession, and it is not the function of the courts to rewrite Section 924(c) to that end.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1995

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*James G. Duncan, who was previously counsel of record in this matter, is now employed by the United States Department of Justice. The Court is requested to substitute Roy T. Englert, Jr., as counsel of record.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No. 94-7448

ROLAND J. BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

CERTIFICATE OF SERVICE

I, Roy T. Englert, Jr., counsel for Roland J. Bailey and a member of the Bar of this Court, hereby certify that on this 7th day of March, 1995, three copies of the Reply Brief for the Petitioner in the above-captioned case were served by first-class mail, postage prepaid, on the following counsel for respondent United States of America:

The Honorable Drew S. Days, III
Solicitor General
Department of Justice
Washington, D.C. 20530

and on the following counsel for Candisha S. Robinson, petitioner in No. 94-7492:

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I further certify that all parties required to be served have been served.

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March 7, 1995

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Francis J. Lorson, Esq.
Chief Deputy Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Roland J. Bailey v. United States, No. 94-7448

Dear Mr. Lorson:

Enclosed for filing are twelve typescript copies of the Reply Brief For The Petitioner in the above-captioned case. Also enclosed is an extra copy to be date-stamped and returned to our messenger.

Because the petition and brief in opposition in this case either have been distributed or are being distributed to the Justices' chambers today, I request that you distribute the reply briefs to the Justices' chambers as soon as possible.

Thank you for your consideration in this matter.

Sincerely,

Roy T. Englert, Jr.

Roy T. Englert, Jr.

Enclosures

(5) (4)

Nos. 94-7448, 94-7492

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ROLAND J. BAILEY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

CANDISHA S. ROBINSON,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI IN 94-7448 FILED DECEMBER 28, 1994
PETITION FOR CERTIORARI IN 94-7492 FILED DECEMBER 29, 1994
CERTIORARI GRANTED APRIL 17, 1995

123 pp

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RELEVANT DOCKET ENTRIES

No. 94-7448; *Bailey* v. *United States*

September 7, 1989	Indictment in United States District Court for the District of Columbia filed
October 24, 1989	Superseding Indictment filed
March 1, 1990	Jury Verdict entered following two-day trial
June 8, 1990	Sentencing
June 18, 1990	Notice of Appeal filed
June 18, 1993	Opinion of the United States Court of Appeals for the District of Columbia Circuit filed
October 18, 1993	Order granting Suggestion for Rehearing In Banc filed
October 4, 1994	Opinion of the In Banc United States Court of Appeals for the District of Columbia Circuit filed

No. 94-7492; *Robinson* v. *United States*

August 8, 1991	Indictment in United States District Court for the District of Columbia filed
October 30, 1991	Retyped Indictment filed
October 31, 1991	Jury Verdict entered following two-day trial
December 18, 1991	Opinion of the United States District Court for the District of Columbia filed
February 11, 1992	Resentencing
February 11, 1992	Notice of Appeal filed
June 18, 1993	Opinion of the United States Court of Appeals for the District of Columbia Circuit filed

July 2, 1993	Resentencing
October 18, 1993	Order granting Suggestion for Rehearing In Banc filed
October 4, 1994	Opinion of the In Banc United States Court of Appeals for the District of Columbia Circuit filed

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 89-0310

UNITED STATES OF AMERICA

v.

ROLAND J. BAILEY

TRIAL TESTIMONY (EXCERPTS)

February 27, 1990

WASHINGTON—DIRECT

* * * *

[64] Q. And if you would, just demonstrate the motion you saw the defendant making as he was getting out of the car.

A. As I asked him to get out, he grabbed the open door at the same time (demonstrating). There's a console here, bucket seats; he was stuffing something like between the seat and the console as he was getting out of the car.

Q. Thank you.

Would you resume the stand, please.

[The witness resumes the stand.]

BY MS. VINCENT:

Q. What, if anything, did you do next after you saw him making this motion?

A. I asked my partner to hold on to the defendant while I seen what he was trying to conceal between the console in the car.

Q. Now, how did you go about locating whatever it was?

A. Well, the door was open, and I squatted down to the driver' side of the car and just pushed the seat back. And as I did, that's—that's when I saw the pouch. And from the pouch dropped a white pack, a pack of white powder.

Q. Did you recover the pouch and the pack of white powder?

A. I did.

[65] Q. What, if anything, did you do with them after you recovered them?

A. I handed them over to my partner, Officer Rice.

Q. Did you observe anything else in the car other than the leather pouch and the packets of white powder?

A. Yes, I did.

Q. And what was that, sir?

A. A round of ammunition.

Q. And where was that located?

A. On the console of the car.

* * * *

WASHINGTON—CROSS

* * * *

[76] Q. But you weren't on your scooter at the time you saw Mr. Bailey. Isn't that correct?

A. That includes parking violations.

Q. So you were just standing there?

A. Yes, sir.

Q. And what kind of—what were you doing that was causing you to stand there?

A. Looking for traffic violations.

Q. To observe traffic violations.

A. Uh-huh.

Q. In fact, you had never received any indication that Mr.—you had no idea that Mr. Bailey was headed toward that area, did you?

A. No, I didn't.

Q. And you had no indication—you had received no information about him, isn't that correct?

A. No, I didn't.

Q. And during the time you observed him, you didn't observe him do anything other than drive that car. Correct?

A. That's right.

* * * *

[82] WASHINGTON—RECROSS

* * * *

BY MR. ELLENBOGEN:

* * * *

Q. Now, let me draw your attention to Government's Exhibit Number 4.

[The exhibit is handed to the witness to view]

BY MR. ELLENBOGEN:

Q. Did you take that photograph?

A. No, I didn't.

Q. Were you present when that photograph was taken?

A. Yes, I was.

Q. Okay.

Now, you testified a few minutes ago when I was asking you questions—remember? And I asked you if you were able to see the gun in plain view and you said you couldn't remember?

A. Right.

Q. Now, does this refresh your recollection?

A. No, it doesn't.

* * * *

[93] RICE—DIRECT

* * * *

BY MS. VINCENT:

* * * *

Q. Now, let's back up a little bit.

Now, you had mentioned that there was a gun recovered from the car?

A. Yes, there was.

Q. Where was the gun found?

A. In the trunk of the vehicle.

Q. And could you describe for the ladies and gentlemen of the jury exactly how you went about searching the trunk and coming upon the weapon.

A. Once the vehicle was stopped and it was determined Mr. Bailey was under arrest, a search was conducted of the trunk—[94] well, we opened the trunk. Inside, there was a whole lot of items. In the trunk were items of clothing and bags and other things, and the gun was there.

Q. I am showing you what has been marked and admitted into evidence as Government's Exhibit Number 4.

[The exhibit is handed to the witness to view.]

BY MS. VINCENT:

Q. I'd ask you to take a look at Government's Exhibit 4 and tell me if you recognize what it is.

A. It's a green plastic bag with clothes inside of what appears to be a trunk and an automatic weapon.

Q. And do you recognize what that picture depicts?

A. It depicts the trunk of the vehicle that we stopped on that particular day.

Q. And is that the location where you found the gun?

A. That is.

* * * *

[95] Q. Officer, was the gun that you recovered from the trunk of the car loaded or unloaded?

[96] A. It was loaded with one clip.

Q. Let me show you what has been marked as Government's Exhibit Number 12 for identification.

[The exhibit is placed in front of the witness.]

BY MS. VINCENT:

Q. I would ask you to take a look at what was contained inside of Government's Exhibit Number 12 for identification and tell me, please, if you recognize what it is.

A. This is the weapon that was recovered from the trunk of the vehicle.

Q. Now, I also want to show you what has been marked Government's Exhibit Number 13 for identification.

[The exhibit is first shown to Mr. Ellenbogen and then handed to the witness to view.]

BY MS. VINCENT:

Q. And I would ask you, please, to take a look at Government's Exhibit Number 13 and tell me if you recognize what was inside of the envelope.

A. One automatic clip with seven rounds of ammo.

Q. Is that the clip that was in that weapon?

A. Yes.

* * * *

[97] Q. Now, you mentioned something else was found in the car?

A. Large sum of money.

Q. Where was the money recovered?

A. Some money was recovered from Mr. Bailey and over $2500 recovered from the trunk of the vehicle.

Q. Where in the trunk of the vehicle was the money recovered?

A. Inside a white waist vest jacket.

Q. In total, do you know how much money was recovered from Mr. Bailey and from that vehicle?

A. It was $3,216.

Q. And do you recall the denominations of that sum of money?

A. I believe it was eight $100 bills, $446 in one-dollar bills; around ten $50 bills; fifteen $20 bills—all of it was initialed with my initials on it.

* * * *

* * * *

Q. Okay.

Officer Rice, you testified that you were on motorcycle patrol that day. Correct?

A. That's correct.

Q. And your duty assignment was to monitor traffic and to engage in traffic stops. Correct?

A. That's what we were doing that day. It was not a specific assignment. We were just doing traffic stops.

Q. Okay.

Now, you received—did you receive instructions that morning before you went on duty as to what your assignment would be?

A. Other than assigned to motor scooter patrol, motorcycle patrol, no.

Q. Okay.

So you were never told that Roland Bailey was out in the community selling drugs, were you?

MS. VINCENT: Objection, Your Honor.

THE COURT: He may answer.

THE WITNESS: I never knew of Roland Bailey.

BY MR. ELLENBOGEN:

Q. In fact, the first time you had ever seen, heard, or knew of him was when you participated in his arrest. Correct?

[108] A. That's correct.

Q. And you never saw—you never saw Mr. Bailey do anything other than drive that car. Correct?

A. That day, that's all I saw until the arrest, yes.

Q. Now, I direct your attention to Government's Exhibit Number 14. That's the vest where you found the money?

A. That's correct.

Q. Did you have an opportunity to examine that vest?

A. Briefly looked at it earlier.

Q. Is Mr. Bailey's name written on that vest anywhere?

A. No, it isn't.

Q. Was he wearing it when he was arrested?

A. No, he wasn't.

Q. That was in a bag of clothing in a trunk. Correct?

A. It was in the trunk; but specifically in a bag, I don't recall. There was a couple of bags there; I can't recall if it was inside a bag.

Q. But there was a lot of stuff in that trunk. Wouldn't that be fair to say?

A. That would be fair to say.

Q. Okay.

Now, let me direct your attention to Government Exhibit Number 4.

[The exhibit is handed to the witness to view.]

BY MR. ELLENBOGEN:

[109] Q. Was that the way the bag appeared when you first observed it?

A. Yes, we moved the bag to open the bag, yes.

Q. So you couldn't see the gun in the trunk when you opened the trunk, could you?

A. No, I couldn't.

Q. How long had you been searching before you discovered the gun?

A. Once we opened the trunk, maybe a minute. It wasn't long.

Q. You started opening the bags in the trunk, too. Correct?

A. That's correct.

Q. And you opened one bag—was that the first bag you looked in?

A. I couldn't say what was the first thing I looked in. I don't know.

Q. Okay.

Now, did you have to—when you opened the bag, was that the very first thing you saw? Or did you have to pull things out before you came across it?

A. No, the gun was visible when the bag was opened.

Q. Okay.

Now, do you recall whether or not the safety to the gun was on when you found it?

A. I don't know. I'm not familiar with automatic weapons.

* * * *

[159] DiDOMENICO—DIRECT

* * * *

Q. I had asked you what is the prevalence of persons involved in drug trafficking possessing and using weapons, firearms.

[160] A. It has become very prevalent on the street now, particularly in the last two or three years.

They use the weapons for several reasons: first of all, self-protection. Drug dealers do get robbed. The stickup men know they have two things—drugs and money.

So they use the weapons not only to protect themselves, but they use them to protect their assets, drugs and money.

Also weapons are used for enforcement purposes. They are also used to protect their turf. Drug dealers get very territorial. They like to protect the areas they deal from. They will use the weapons to protect their areas.

So currently there are a lot of weapons seized out there from drug dealers, particularly in the last two or three years.

Q. Let me ask you, detective—well, let's go back to drugs for a minute.

Are the drugs that persons who are involved in drug trafficking use always on their person?

A. No, like drug dealers commonly employ what's called a stash. That's simply a place of concealment. They hide the drugs. They do that for a number of reasons.

First of all, should they be arrested, they don't want to be caught with drugs on their person. They also don't

want police seizing their drugs; they don't want the stickup people to get their drugs; so they will hide them.

[161] Q. What about the—in that same vein, what about the weapons? Are the weapons always on the person?

A. If someone is on the street, generally they may be on their person or within reach.

Depending on the type of situation, if it's a stash house where they store their drugs and cash, there would be weapons within the premises within reach.

They hide them in vehicles, trucks, and even people use airplanes to conceal them. But they are made so that they are accessible in case they need to use them to protect drugs or cash or their person.

* * * *

[164] DiDOMENICO—CROSS

* * * *

Q. Now, detective, let's talk about guns for a little bit.

You kept saying that the purpose for having guns is to protect yourself. Right?

A. Well, when used with drugs, yes.

Q. That's one purpose. One purpose is to protect you.

[165] Correct?

A. Protect the individual, yes.

Q. One purpose is to protect your drugs. Correct?

A. The drugs, the money.

Q. Another purpose is to enforce so that people may know you. Correct?

A. Enforcement for either people who owe or people who have dealt for you and messed up, yes, they are used.

Q. Okay.

Now, we talked about the protection. You've used the phrase that the guns have got to be accessible. Right?

A. I simply stated it would be accessible, yes, to protect self, stash, . . .

Q. That's right.
A. That would do with drugs and money.
Q. In fact, if somebody were on the street with drugs, they would want to be able to get to their guns—well, you don't—when the stickup boys come, they don't give you any advance warning, do they?
A. No, neither do the cops.
Q. It happens like that (snapping fingers), doesn't it?
A. Yes.
Q. So you need to be able to get your gun like that (snapping fingers), don't you?
A. Well, it should be accessible to them if they're going [166] to use a weapon, yes.
Q. If people are—
A. To protect their turf.
A. That's right.
Generally, it's sort of understood on the street that you really don't carry your weapon unless you intend on using it. Isn't that right?
A. But anyone who carries one would intend to use it.
A. That's right.
And you need to be able to use it very quickly right?
A. If indeed that's what they're for.
Q. Now, let's talk about the actual use of the gun. Are you familiar with semiautomatic guns?
A. Vaguely. I carry one myself.
Q. And the idea behind the semiautomatic gun is all you've got to do is just pull the trigger once you get the slide going. Right?
A. Firepower, yes.
Q. That's right.
And that's because you get more firepower when you can fire eight shots—bang, bang, bang, bang, bang—then you can having to put a bullet in a gun one at a time. Right?
A. Surely. I used to carry a six-shot. Now I carry 16. It's a lot better and a lot faster.

[167] Q. Because power and speed are what's most important. Isn't that right?
A. If you are trying to protect yourself, yes.
Q. Detective, in all your experience, you've talked to a lot of drug dealers. Right?
A. Yes.
Q. You've talked to a lot of drug users?
A. Drug dealers, traffickers,—
Q. Stickup boys? Have you ever talked to any stickup boys?
A. Oh, yes.
Q. In all your experience talking with the stickup boys, did any of them ever tell you that they ever gave the person they were sticking up an opportunity to go get their gun first?
A. That's ridiculous, no.
Q. Thank you.
A. They don't give you much chance to get your weapon, but neither would I as a cop.
Q. Thank you.
MR. ELLENBOGEN: I have no further questions.
THE COURT: Thank you, Mr. Ellenbogen.
Anything else, Ms. Vincent?
MS. VINCENT: I just have a couple.

REDIRECT EXAMINATION

BY MS. VINCENT:

Q. Detective, in your experience, you had mentioned to us [168] that guns are secreted in different places?
A. Sure.
Q. And with reference to cars, where would guns be secreted?
A. Common spots are glove boxes, underneath the seat, or the trunk.
Q. Well, detective, if the gun is in the trunk, is it, in your opinion, accessible to the person who possesses it?
A. They can get to it. A lot of weapons are stored with the stash; so in case they are forced to get in the

trunk, a weapon is there. The stash, the drugs, the cash—the weapon is readily available.

Q. Thank you.

MS. VINCENT: I have nothing further.

THE COURT: Thank you.

Anything else, Mr. Ellenbogen?

MR. ELLENBOGEN: One further question.

RECROSS-EXAMINATION

BY MR. ELLENBOGEN:

Q. You don't know anything about this case, do you?

A. That is correct.

Q. Thank you.

THE COURT: Anything else?

MS. VINCENT: No, Your Honor.

THE COURT: Thank you, Detective DiDomenico. You're excused, sir.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title Omitted in Printing)

BAILEY JURY INSTRUCTIONS (EXCERPTS)

February 28, 1990

* * * *

[89] The defendant has been charged in count two with using or carrying a firearm during and in relation to a drug-trafficking crime as charged in count one of the indictment.

In order to find the defendant guilty of using or carrying a firearm during and in relation to a drug-trafficking crime, you must find that the government has proven beyond a reasonable doubt each of the following: one, that the defendand committed a drug-trafficking crime for which he may be prosecuted in a United States court, that is, the charge in count one; and, two, that during and in relation to the commission of that drug-trafficking crime, the defendant knowingly carried or used a firearm.

You may find that the defendant knowingly and intentionally carried or used a firearm if he possessed the firearm and intended that the firearm be present and available in some manner.

A person may possess an object by having it on his person or by having control over the object and access to it.

Using the firearm does not necessarily mean discharging it or otherwise firing or displaying the firearm. The word "use" can mean any use, such as display of the firearm or use of the firearm for security or for protection purposes.

However, the defendant must have known that the gun was present and intended that the gun was to be used in some way to further the drug-trafficking crime charged in [90] count one.

The mere presence of the firearm at or during a crime is not enough to find that the firearm was used.

The term "during" means at some point in the course of a drug-trafficking crime, regardless of how short a period of time.

"In relation to" means that there must be a relationship between the firearm and the underlying narcotics offense.

You may infer that the possession of a firearm is intended to further the underlying narcotic offense, but you are not required to do so.

I instruct you that possession with the intent to distribute cocaine, which is the offense set forth in count one of the indictment, is a drug-trafficking crime.

You must be satisfied that the defendant is guilty of the underlying narcotic offense before you may convict him of using or carrying a firearm in relation to a drug-trafficking crime.

* * * *

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 90-3119

UNITED STATES OF AMERICA

v.

ROLAND J. BAILEY,
Appellant.

Appeal from the United States District Court
for the District of Columbia (CR 89-00310-01)

Argued April 5, 1993

Decided June 18, 1993

Before D.H. GINSBURG, SENTELLE, and RANDOLPH, Circuit Judges.

D.H. GINSBURG,* Circuit Judge:

Roland J. Bailey appeals his conviction for (1) possession with intent to distribute five grams or more of cocaine in violation of 21 U.S.C. § 841(a); (2) using or carrying a firearm in connection with that drug trafficking offense in violation of 18 U.S.C. § 924(c); and (3) possession of a firearm by a felon in violation of 18 U.S.C. § 922(g). He alleges that the district court com-

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* Except Part II.B., which is filed *per curiam*.

mitted reversible error by refusing to instruct the jury on simple possession as a lesser included offense of possession with intent to distribute cocaine; that there was insufficient evidence of his having "used" a gun to convict him under 18 U.S.C. § 924(c); and that the 16-month delay between his arrest and indictment violated his right to a speedy trial pursuant to 18 U.S.C. § 3161 (b). We affirm the convictions on all counts.

I. BACKGROUND

In May 1988 Officers Ronald T. Washington and Kevin Rice of the Metropolitan Police Department stopped Bailey's car after noticing that it had no front license plate and no inspection sticker. Officer Washington asked Bailey for his driver's license but Bailey instead handed him a District of Columbia identification card. Officer Washington then ordered Bailey to get out of his car. As Bailey exited the car, Officer Washington saw him push something between the seat and the front console. Upon searching the passenger compartment, Officer Washington found one round of ammunition and 27 plastic bags containing a total of 30 grams of cocaine. After placing Bailey under arrest, Officer Rice searched the trunk and found there a loaded 9-mm. pistol and $3,216 in cash, mostly small bills.

Later that month Bailey was indicted in the Superior Court of the District of Columbia on D.C. drug and weapons charges. In September 1989 a superseding indictment was handed down in federal district court, charging Bailey with the federal drug and weapon charges enumerated above.

At Bailey's trial Detective Charles DiDomenico, a narcotics expert, testified that the drugs found in the appellant's car were packaged for sale in $50 bags and that the quantity and packaging were "not consistent with personal use." He also stated that drug dealers frequently carry weapons "not only to protect themselves, but [also] to protect their assets, drugs and money." The jury found the appellant guilty as charged, and the district court sentenced him to concurrent prison terms of 51 months each on the first and third charges and sixty months on the second charge.

II. ANALYSIS

As indicated above, the appellant offers three grounds for appeal.

A. Instruction on Lesser Included Offense

First, the appellant argues that the district court erred in refusing to instruct the jury on simple possession of cocaine as a lesser-included offense of possession with intent to distribute cocaine. Not so.

The district judge is required to give a lesser-included offense instruction only when "a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater." *Schmuck v. United States,* 489 U.S. 705, 716 n. 8, 109 S.Ct. 1443, 1451 n. 8, 103 L.Ed.2d 734 (1989); *see also United States v. Thornton,* 746 F.2d 39, 47 (D.C.Cir.1984) (lesser-included offense instruction is required "if there is any evidence fairly tending to bear upon the lesser included offense, 'however weak' that evidence may be") (quoting *Belton v. United States,* 382 F.2d 150, 155 (D.C.Cir.1967)). There must "be some rational basis for the lesser charge; otherwise it is merely a device for [a] defendant to invoke the mercy-dispensing prerogative of the jury." *United States v. Sinclair,* 444 F.2d 888, 890 (D.C.Cir.1971); *see also Kelly v. United States,* 370 F.2d 227, 229 (D.C.Cir.1966) ("An element of the mercy-dispensing power is doubtless inherent in the jury system, and may well be a reason why a defendant seeks a lesser included offense instruction, but it is not by itself a permissible basis to justify such an instruction").

In this case there was no evidence from which a jury could rationally have concluded that Bailey possessed the

cocaine without intending to distribute it. He was nabbed with the 30 grams of cocaine appropriately packaged for street distribution and with more than $3000 in small bills. According to the uncontradicted testimony of the Government's narcotics expert, possession of 27 packages each containing $50 worth of cocaine is inconsistent with merely personal use. *See United States v. Beckham*, 968 F.2d 47, 53 (D.C.Cir.1992) (upholding denial of instruction on lesser-included offense of simple possession where Government drug expert testified without rebuttal that stash was incompatible with personal use); *accord United States v. Payne*, 805 F.2d 1062, 1067 (D.C.Cir.1986) ("If the jury believed the Government's [expert testimony], the jury would have had no rational basis for returning a guilty verdict of simple possession").

As in *Beckham*, therefore, "No aspect of the government or defense cases—not even a combination of aspects of each—supports a simple possession theory." 968 F.2d at 52. Accordingly, we affirm Bailey's conviction for possession with intent to distribute.

B. Use of the Firearm

Section 924(c)(1) provides, in pertinent part:

> Whoever, during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm, shall in addition to the punishment provided for such . . . drug trafficking crime, be sentenced to imprisonment for five years.

Bailey claims that there was insufficient evidence for the jury to find that he "use[d]" the 9-mm. gun found in his trunk "during and in relation to" a drug trafficking crime.

"As a jury has found [the appellant] guilty, we must consider the evidence in the light most favorable to the Government," *United States v. Jefferson*, 974 F.2d 201, 205 (D.C.Cir.1992), and allow the Government "the benefit of all reasonable inferences that may be drawn from the evidence." *United States v. Sutton*, 801 F.2d

1346, 1358 (D.C.Cir.1986). In determining the sufficiency of the evidence, we must affirm the appellant's conviction if "*any* rational trier or fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (emphasis in original); *United States v. Derr*, 990 F.2d 1330, 1336 (D.C.Cir.1993); *United States v. Morris*, 977 F.2d 617, 619 (D.C.Cir.1992); *United States v. Long*, 905 F.2d 1572, 1577 (D.C.Cir.1990); *United States v. Poston*, 902 F.2d 90, 94 (D.C.Cir.1990).

This court has fashioned a two-part test to determine whether a defendant "used" a firearm "during and in relation to" the drug trafficking crime he committed. *See Derr*, 990 F.2d at 1337; *Jefferson*, 974 F.2d at 225. First, there must be evidence of a "nexus . . . between [the] particular drug *offender* and the firearm." *Long*, 905 F.2d at 1577 (emphasis added). This element can be, and usually is, satisfied by proof that the defendant actually or constructively possessed the gun. *See Derr*, 990 F.2d at 1337. Second, there must be evidence "that the guns facilitate[d] the predicate *offense* in some way." *United States v. Harris*, 959 F.2d 246, 261 (D.C.Cir. 1992) (emphasis added); *accord Derr*, 990 F.2d at 1337. "Both elements must be proven to establish criminal liability under § 924(c)." *Jefferson*, 974 F.2d at 205.

Because the appellant concedes that he possessed the firearm, we need address only the question whether the Government has shown that the gun facilitated the appellant's commission of a drug trafficking offense. It is well-settled that "mere possession of a gun at the time that the crime is committed is not enough to establish use." *United States v. Bruce*, 939 F.2d 1053, 1054 (D.C.Cir. 1991). On the other hand, the Government need not establish that the defendant brandished or discharged the weapon, *see Morris*, 977 F.2d at 621; *Long*, 905 F.2d at 1576; *United States v. Evans*, 838 F.2d 891, 896 (D.C.Cir.1989); *United States v. Castro-Lara*, 970 F.2d

976, 983 (1st Cir.1992); *United States v. Plummer*, 964 F.2d 1251, 1255 (1st Cir.1992); *United States v. Alvarado*, 882 F.2d 645, 653 (2d Cir.1989); *United States v. Meggett*, 875 F.2d 24, 29 (2d Cir.1989); *United States v. Raborn*, 872 F.2d 589, 595 (5th Cir.1989); *United States v. Tolliver*, 937 F.2d 1183, 1190 (7th Cir.1991); *United States v. Lyman*, 892 F.2d 751, 753 (8th Cir.1989); *United States v. Matra*, 841 F.2d 837, 841-43 (9th Cir.1988); *United States v. Mason*, 658 F.2d 1263, 1270-71 (9th Cir.1981); *United States v. Moore*, 580 F.2d 360, 362 (9th Cir.1978), or even "that he was carrying the gun at the time of a specific transaction." *United States v. Knox*, 950 F.2d 516, 518 (8th Cir.1991).

Rather, in addition to showing possession (*i.e.* a nexus between the firearm and the offender), the Government need only "prove a connection between the firearm and an underlying drug offense," here possession with intent to distribute cocaine. *Jefferson*, 974 F.2d at 206; *accord Castro-Lara*, 970 F.2d at 983; *United States v. Robertson*, 706 F.2d 253, 256 (8th Cir.1983); *United States v. Stewart*, 779 F.2d 538, 540 (9th Cir.1985). More precisely, "the Government is only obliged to show that the firearm was available to provide protection to the defendant in connection with his engagement in drug trafficking." *United States v. Molinar-Apodaca*, 889 F.2d 1417, 1424 (5th Cir.1989); *accord United States v. munoz-Fabela*, 896 F.2d 908, 911 (5th Cir.1990) ("It is enough that the firearm was present at the drug-trafficking scene, that the weapon could have been used to protect or facilitate the operation, and that presence of the weapon was in some way connected with drug trafficking"); *Stewart*, 779 F.2d at 540 (Government must show that defendant possessed firearm and "that the firearm facilitated or had a role in the crime, such as emboldening an actor who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others").

The Supreme Court has recently endorsed an "expansive" understanding of what constitutes use "in relation to" a drug trafficking offense. *Smith v. United States*, —— U.S. ——, ——, 113 S.Ct. 2050, 2058, 124 L.Ed. 2d 138 (1993). In *Smith* the Supreme Court cites the Webster Dictionary definition of "in relation to" as meaning "with reference to" or "as regards." *Id.* (*quoting* Webster's New International Dictionary of the English Language, at 2102). The Court then states that "[t]he phrase 'in relation to' thus, at a minimum, clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." *Smith, supra* at ——, 113 S.Ct. at 2059. Modifying the verb "use" with "in relation to" serves the purpose of " 'allay[ing] explicitly the concern that a person could be' punished under § 924(c)(1) for committing a drug trafficking offense 'while in possession of a firearm' even though the firearm's presence is coincidental or entirely 'unrelated' to the crime." *Id.* at ——, 113 S.Ct. at 2058 (*quoting Stewart*, 779 F.2d at 539 (Kennedy, J.)).

Here the defendant was carrying in the front seat of his car crack cocaine neatly packaged for sale in $50 bags, and in the trunk $3,216 in small bills. The trier of fact could reasonably infer that the money was the proceeds of several already-completed drug transactions. *Cf. United States v. Curry*, 911 F.2d 72, 80 (8th Cir. 1990) ("we believe it was permissible to infer that the large sums of unexplained cash found in the same bedroom as the guns came, at least in part, from drug sales" given the large quantities of high purity cocaine found elsewhere in the house); *United States v. Beverly*, 921 F.2d 559, 563 (5th Cir.1991) ("A jury . . . could reasonably connect the [$2,200 in] cash to the drug trafficking"); *compare Bruce*, 939 F.2d at 1055-56 (showing that gun was available only to protect future intended distribution of drugs insufficient for § 924(c) conviction).

As the Government's expert witness testified, a drug dealer often carries a gun in order to protect himself, his contraband, and his money. *See United States v. LaGuardia*, 774 F.2d 317, 321 (8th Cir.1985) (recognizing "the utility of firearms in advancing criminal adventures in narcotics" and observing that "[w]eapons can be used for protection or intimidation and therefore facilitation of illegal transactions"); *accord United States v. Grant*, 545 F.2d 1309, 1313 (2d Cir.1976); *United States v. Wiener*, 534 F.2d 15, 18 (2d Cir.1976); *United States v. Rosado*, 866 F.2d 967, 970 (7th Cir.1989); *Curry*, 911 F.2d at 80; *United States v. Young-Bey*, 893 F.2d 178, 181 (8th Cir.1990); *United States v. Milham*, 590 F.2d 717, 721 (8th Cir.1979); *Stewart*, 779 F.2d at 540; *Mason*, 658 F.2d at 1271.

To be sure, the gun here was not within Bailey's reach while he was driving. In that circumstance, "the court's critical concern is not whether the gun was instantly available or exclusively dedicated to the narcotics trade, but whether it was available for use in connection with the narcotics trade." *Castro-Lara*, 970 F.2d at 983 (quotation marks and citation omitted); *accord United States v. Boyd*, 885 F.2d 246, 250 (5th Cir.1989) ("It is enough that the firearm was present at the drug-trafficking scene, that the weapon could have been used to protect or facilitate the operation, and that the presence of the weapon was in some way connected with the drug trafficking"); *Young-Bey*, 893 F.2d at 181 (jury may "infer that firearms found among a drug trafficker's paraphernalia are used to further the drug venture and are thus used during and in relation to drug trafficking within the meaning of section 924(c)"); *cf. United States v. Acosta-Cazares*, 878 F.2d 945, 952 (6th Cir.1989) (" 'uses' and 'carries' [in § 924(c)(1)] should be construed broadly to cover the gamut of situations where drug traffickers have ready access to weapons with which they secure or enforce their transactions").

Indeed, if Bailey sold drugs from anywhere outside the passenger compartment of his car, *e.g.*, in a building or

on a street corner—a rather likely scenario, to say the least—then he could remove the gun from the trunk and carry it with him as he conducted this risky business. *Cf. Jefferson*, 974 F.2d at 207 (gun stored in backyard next to contraband "was sufficiently accessible"); *Castro-Lara*, 970 F.2d at 983-84 (unloaded gun in locked automobile trunk was available for use during and in relation to drug trafficking crime); *Beverly*, 921 F.2d at 561-63 (unloaded guns and ammunition in safety deposit box underneath mattress in room where drugs were found sufficient to convict under § 924(c)); *Molinar-Apodaca*, 889 F.2d at 1419-1424 (upholding conviction where gun and cash were in locked safe in house and drugs were stashed in shed outside); *Rosado*, 866 F.2d at 968-69 (evidence sufficient for § 924(c)(1) conviction where defendant left gun in own car and conducted drug transaction in nearby car); *United States v. Knox*, 950 F.2d 516, 519 (8th Cir.1991) (gun in passenger compartment of car sufficiently available to defendant carrying drugs and loaded ammunition clip as he exited nearby building); *Curry*, 911 F.2d at 80 (although "found in a different room than the cocaine" gun was "readily available to secure the possession of [appellant's] cocaine and cash"); *Stewart*, 779 F.2d at 539 (defendant in car in front of his residence had "rifle under his control in the trunk of his car"). Moreover, it was unlikely that in conducting a sale—the moment of maximum exposure to depredation—the defendant would fail to protect his inventory, including the 27 bags of cocaine that later formed the basis of the indicted charge. The jury could reasonably infer therefore that the weapon located in the trunk was used to facilitate the defendant's sales of narcotics and the possession of all of the drugs that necessarily preceded those transactions. *See United States v. Hadfield*, 918 F.2d 987, 998 (1st Cir.1990) ("so long as one purpose in situating the weapon nearby was to protect the narcotics enterprise, that need not have been defendant's sole purpose"); *Stewart*, 779 F.2d at 539

("Given the use of firearms in some drug transactions . . . and the known risks of conducting an illegal drug business, the jury could infer from all of the evidence that [defendant]'s possession of the [firearm] outside his residence was intended to facilitate the drug operations or secure the premises where contraband and other evidence were located"); *see generally United States v. Ingraham*, 832 F.2d 229, 240 (1st Cir.1987) ("The law is not so [ostrich-like] as to compel a criminal jury to ignore that which is perfectly obvious").

The appellant argues that because the gun was in the trunk, under our holdings in *United States v. Bruce*, 939 F.2d 1053 (D.C.Cir.1991) and *United States v. Derr*, 990 F.2d 1330, 1339 (D.C.Cir.1993), it can not be deemed to have protected or facilitated his past possession of the cocaine. In *Bruce* the court found that the small derringer in the defendant's raincoat could not have been used to protect his possession of drugs because the small gun was "hardly the sort of weapon a drug dealer would employ for protection against an effort to penetrate a crack house." *Bruce*, 939 F.2d at 1055. Instead, the gun was clearly intended "to be used for defendant's protection at the time and place of subsequent distribution." *Bruce*, 939 F.2d at 1056. Similarly, in *Derr* we found that the placement of an unloaded gun behind a padlocked door in a house "suggested that it was far more likely [to] . . . be used to protect the [future] distribution, rather than the possession, of the drugs." *Derr*, 990 F.2d at 1339. Indeed, in getting his gun from the closet the defendant in *Derr* risked "expos[ing] the drugs to capture," so that "the gun seems to have been put where it was least likely to protect possession of the drugs." *Id.* (footnote omitted).

Here, in contrast, the cocaine packaged for sale and the $3,216 in small bills in the trunk logically support the inference that Bailey had already been dealing drugs from his car. And the loaded gun in the trunk was sufficiently accessible to have been used to protect a prior distribution effected outside the confines of the passenger compartment of the car.

In protecting such an earlier distribution of drugs, the gun was necessarily used also to protect Bailey's earlier possession of cocaine. As he walked from his car to the point of sale, like any drug dealer he was constantly in danger of being attacked by bandits or by a potential customer. Until the actual sale, of course, he possessed the narcotics. In effect, for a drug dealer on the streets, possession and distribution are inextricably linked, *cf. Bruce*, 939 F.2d at 1055 ("in the typical crack house possession and distribution are intertwined"), and the jury could reasonably conclude that during the tense moments leading up to the exchange of drugs and money, Bailey used the gun in the trunk to protect his inventory of drugs (including the 27 bags recovered by the police). *Accord Derr*, 990 F.2d at 1337 ("there must be evidence showing that the firearm actually facilitated the *possession* of the drugs") (emphasis in original).

For the foregoing reasons, we believe that *Derr* and *Bruce* can be distinguished from the situation here. In any event, the precedential value of *Derr* and *Bruce* has been called into question by the Supreme Court's recent decision in *Smith v. United States*, —— U.S. ——, ——, 113 S.Ct. 2050, 2058, 124 L.Ed.2d 138 (1993), which adopts a much less restrictive interpretation of what constitutes "use" of a firearm "in relation to" a drug trafficking offense. *Smith* states that a gun is used in relation to a drug trafficking offense if "the firearm [has] some purpose or effect with respect to the drug trafficking crime." *Id.* at ——, 113 S.Ct. at 2059. Clearly, the gun had the purpose of protecting the cash in the trunk, and only slightly less obviously, had the purpose of protecting the drugs and money on Bailey's person. This is not a case where "the firearm's presence is coincidental or entirely 'unrelated' to the crime." *Id.* at ——, 113 S.Ct. at 2059

(internal citation omitted). When § 924(c) is construed "in accord with its ordinary or natural meaning," as we are reminded to do in *Smith, id.* at ——, 113 S.Ct. at 2054, we think a rational jury could easily have concluded that Bailey "used" the loaded high-caliber gun in the trunk of the car he was driving "during and in relation to" a drug trafficking crime.

C. Speedy Trial Act Challenge

Bailey argues that the 16-month delay between his arrest and his indictment in federal court violates his right to a speedy trial pursuant to the Speedy Trial Act, 18 U.S.C. § 3161(b). In his brief the appellant concedes that *United States v. Mills*, 964 F.2d 1186, 1189 (D.C. Cir.1992) (en banc), forecloses his appeal on this issue, but states that he wishes to preserve his point in case the Supreme Court grants certiorari in *Mills*. Since the filing of Bailey's brief, however, the Court has denied certiorari in *Mills*, —— U.S. ——, 113 S.Ct. 471, 121 L.Ed.2d 378 (1992), and we therefore affirm the district court on this issue.

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is in all respects

Affirmed.

D.H. GINSBURG, Circuit Judge, dissenting as to Part II.B.:

Sometimes the law *is* "a ass, a idiot," Mr. Bumble. Our recent holdings in *United States v. Derr*, 990 F.2d 1330 (D.C.Cir.1993), and *United States v. Bruce*, 939 F.2d 1053 (D.C.Cir.1991), are cases in point. But until the Supreme Court or this court sitting *en banc* changes the law, those decisions are the law and we must apply them faithfully. Because I do not believe that our disposition of the § 924(c) issue can honestly be reconciled with *Derr* and *Bruce*, I respectfully dissent.

In *Derr* an unloaded .357 magnum and nine rounds of ammunition were found alongside cash, drugs packaged for sale, and a scale, all in a locked closet in an apartment. There was incontestable evidence of drug trafficking from the apartment. *See* 990 F.2d at 1332, 1338. Nonetheless, this court held that the gun could not have been " 'used' to facilitate the predicate offense" of possession with intent to distribute drugs because the unloaded firearm was too inaccessible to protect the possession of the drugs in the apartment. *Id.*, at 1337. Similarly, in *Bruce* a loaded gun was found stored with drugs, cash, and ziplock bags in a raincoat handing in a closet. Again the court held that the gun's location was too remote from the defendant for him to use it to protect his possession of the drugs and thus to facilitate the predicate offense of possession with intent to distribute the drugs. *See* 939 F.2d at 1056.

The present case presents a similar fact pattern: a loaded 9-mm. pistol was found alongside cash in the locked trunk of a car, while the drugs were located next to the defendant in the front seat of the car. The court distinguishes *Derr* and *Bruce*, however, on the ground that a jury could reasonably infer that Bailey had used the gun here to protect himself and his goods during drugs sales made before his arrest, as well as the cash proceeds thereof. The problem is that the exact same

inference could easily have been drawn in *Derr* and *Bruce*, but the court in those cases found the evidence insufficient as a matter of law to support a conviction for using a firearm to facilitate a drug trafficking offense.

I do not see any principled basis for distinguishing *Derr* or *Bruce* from the present case. That the gun in *Derr* was unloaded is certainly not dispositive. An unloaded gun can facilitate a drug trafficking crime almost as well as a loaded gun, by emboldening its owner and intimidating others. *See United States v. Gutierrez-Silva*, 983 F.2d 123, 124-25 (8th Cir.1993) (upholding § 924(c) conviction involving unloaded gun in closet of apartment containing no ammunition; crediting expert's testimony that "it is very difficult for a person to determine whether a gun was loaded or not when the gun is pointed at that person"); *cf. McLaughlin v. United States*, 476 U.S. 16, 17, 106 S.Ct. 1677, 1678, 90 L.Ed.2d 15 (1986) (holding that unloaded handgun is "dangerous weapon" under federal bank robbery statute on the grounds that a gun "is always dangerous even though it may not be armed").* Nor can *Bruce* be distinguished on the ground that the defendant there possessed a smaller firearm, a Derringer. The court can not substitute its judgment for the jury's by inferring that an otherwise accessible gun is too small to be useful.

Such particularistic distinctions are all beside the point anyway under the highly formalistic analysis that this circuit has apparently adopted. In order to uphold a conviction under § 924(c) there must be evidence that the

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* *See also* DIRTY HARRY (Warner Bros. 1971) (bank robber decides not to reach for pistol when inspector points gun at him and says, "I know what you're thinking: 'Did he fire six shots, or only five?' Well, to tell you the truth, in all this excitement I've kinda lost track myself. But being this is a .44 magnum, the most powerful handgun in the world, and would blow your head clean off, you've got to ask yourself one question: 'Do I feel lucky?, . . . Well, do ya, punk?'") (*quoted in* Eric Bailey, *How to Get Your Own Back*, DAILY TELEGRAPH, Feb. 5, 1998, at 17).

gun "facilitate[d] the predicate offense in some way." *United States v. Harris*, 959 F.2d 246, 261 (D.C.Cir. 1992). Although the issue of what constitutes a "predicate offense" in this context appears not to have been contested in prior cases, our caselaw requires that a § 924(c) conviction be predicated upon a drug offense charged in the indictment and proved at trial—which in this case could only be possession with intent to distribute. *See, e.g., Derr*, 990 F.2d at 1337 (gun must have provided protection during "the time of the possession which is the basis of the charge"); *cf. United States v. Laing*, 889 F.2d 281, 288 (D.C.Cir.1989) (upholding § 924(c) conviction despite acquittal for predicate offense because jury may have still been "convinced of the defendant's guilt").

Thus when the defendant is charged only with possession, "there must be evidence showing that the firearm actually facilitated the *possession* of the drugs." *See Derr*, 990 F.2d at 1337 (emphasis in original). I for one cannot imagine how a gun in a locked car trunk could have been used to protect the possession of the 27 bags in the front seat—if one accepts the premise that the guns in *Derr* and *Bruce* could not protect the drugs with which they were closeted. *See Derr*, 990 F.2d at 1337-1339 (unloaded gun stowed together with ammunition, drugs, and cash in locked closet in apartment insufficiently accessible to protect drugs in same closet); *Bruce*, 939 F.2d at 1056 (gun in raincoat hanging in closet not sufficiently available to protect drugs in pocket of same raincoat).

It is irrelevant that the jury here might reasonably have inferred that the gun was used to protect the possession of drugs Bailey had sold earlier or the cash proceeds of those sales, because neither the cash nor the already-sold drugs formed "the basis of the indicted charge" against him. *Compare Bruce*, 939 F.2d at 1055 (rejecting Government's argument "that since possession of drugs with intent to distribute is a 'continuing crime,' " proximity

is sufficient to establish "use") *with* Op. at 1118 ("The jury could reasonably infer . . . that the weapon located in the trunk was used to facilitate the defendant's sales of narcotics and the possession of all of the drugs that necessarily preceded those transactions").

All that said, it seems to me that the "predicate offense" analysis of our circuit defies both apparent congressional intent and common sense. Congress clearly enacted § 924(c) in order to deter drug dealers from arming themselves, which vastly enhances the threat they pose to the community. *See Smith v. United States*, —— U.S. ——, ——, 113 S.Ct. 2050, 2059, 124 L.Ed.2d 138 (1993), ("introduction [of guns] into the scene of drug transactions dramatically heightens the danger to society") (*quoting United States v. Harris*, 959 F.2d 246, 262 (D.C.Cir.1992)). Common sense indicates that although he was not charged with distribution, Bailey had in fact been dealing drugs; he was not carrying more than $3000 in small bills for nothing and he was not planning to give the last of his drugs away free or to raffle them off for charity. Common sense also suggests that Bailey had taken the gun along to facilitate his drug transactions; he was not just delivering the gun to his fearful grandmother for use as domestic protection.

On its face § 924(c) reaches the use of a firearm "in relation to *any* . . . drug trafficking crime," not only to a "predicate [drug] offense" charged against the defendant. Presumably, therefore, if we were writing on a clean slate, we might hold that the "related" drug trafficking crime need not have been charged so long as all of its elements are proved beyond a reasonable doubt. *Cf.* Op. at 1116-17 (stating that jury could reasonably infer that money was proceeds of prior drug distributions). Our circuit, however, in *Bruce* and *Derr* ignored ordinary rules of construction and adopted a cramped interpretation of § 924(c). Were it not for those cases I would gladly join the majority in upholding the § 924(c) conviction.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

(Title Omitted in Printing)

Oct. 8, 1993

Before: MIKVA, Chief Judge; WALD, EDWARDS, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBERG, SENTELLE, HENDERSON, and RANDOLPH, Circuit Judges.

ORDER

PER CURIAM.

Appellant's Suggestion For Rehearing *En Banc* and the response thereto have been circulated to the full Court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service voted in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is granted and this case will be reheard by the Court sitting *en banc*.

It is FURTHER ORDERED, by the Court *en banc*, that the judgment of the court filed herein on June 18, 1993, 995 F.2d 1113, is hereby vacated.

SUPREME COURT OF THE UNITED STATES

No. 94-7448

ROLAND J. BAILEY,
Petitioner

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. This case is consolidated with 94-7492, *Candisha Summerita Robinson, aka Candysha Robinson v. United States,* and a total of one hour is allotted for oral argument.

April 17, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. No. 91-453-01(CRR)

UNITED STATES

v.

CANDYSHA SUMMERITA ROBINSON

ROBINSON JURY INSTRUCTIONS (EXCERPTS)

October 31, 1991

* * * *

COUNT FIVE—USING OR CARRYING A FIREARM DURING AND IN RELATION TO A DRUG TRAFFICKING OFFENSE

Count Five charges the defendant with using or carrying a firearm, specifically a High Standard, .22 caliber Derringer, during and in relation to the offenses charged in Counts Three and Four of this Indictment, in violation of Title 18, U.S. Code, §§ 924(c)(1) and Title 18, U.S. Code § 2.

The essential elements of this offense, each of which the Government must prove beyond a reasonable doubt are:

First, that the defendant committed the offenses charged in Counts Three and Four of this Indictment, that is, she possessed with the intent to distribute 5 or more grams of a controlled substance, namely a mixture or substance containing a detectable amount of cocaine base on July 16, 1991, and that she did so within 1,000 of Gallaudet University; and

Second, that the defendant knowingly and intentionally used or carried a firearm, specifically, a High Standard, .22 caliber Derringer, while committing the offenses charged in Counts Three and Four.

To establish the first element of this offense, the Government must prove beyond a reasonable doubt that the defendant committed the offenses charged in Counts Three and Four. If you answered "No" on your Verdict Form as to Count Three or Count Four, then you must also answer "No" on your Verdict Form with regard to this offense. You are reminded to pay careful attention to the instructions on your Verdict Form in this regard.

To establish the second element of the offense charged in Count Five, the Government must prove beyond a reasonable doubt that the defendant knowingly and intentionally used or carried the firearm during and in relation to the offenses charged in Counts Three and Four.

The Indictment alleges the firearm in question was one High Standard, .22 caliber Derringer. The term "firearm" means any weapon which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive of the frame or receiver of such a weapon.

I have previously explained to you the difference between actual and constructive possession and sole and joint possession in Count Three. These propositions of law also apply here to the issue of whether a defendant possessed the firearm as charged in Count Five.

The term "during and in relation to" means at some point in the course of the offense on July 16, 1991, regardless of how short a period of time. To prove that a defendant used or carried a firearm during and in relation to the offenses charged in Counts Three and Four, the Government is not required to prove that a defendant had actual possession of the firearm or that he used

it in an affirmative manner, for example by brandishing or firing it. Instead, the Government must prove beyond a reasonable doubt only that the firearm was in such a location that it would have been available to a defendant to provide protection or assistance during the commission of the offense of possession with intent to distribute 5 or more grams of cocaine base within 1,000 feet of Gallaudet University as charged in Counts Three and Four.

You may find that the defendant knowingly and intentionally used or carried a firearm if she did so consciously, voluntarily and purposely, and not because of mistake, inadvertence or accident.

The government has also charged the defendant with aiding and abetting the commission of the offense charged in Count Five. As an alternative theory, the Government charges that the defendant aided and abetted another person or persons in carrying or using a firearm during and in relation to the offenses charged in Counts Three and Four of this Indictment. I have previously described the principles of aiding and abetting, and will not define it again here. In considering whether this defendant aided and abetted the commission of the offense charged in Count Five, you are specifically instructed to consider the explanation of aiding and abetting liability which the court has given you in Count One.

* * * *

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

(Title Omitted in Printing)

Dec. 18, 1991

MEMORANDUM OPINION AND ORDER

CHARLES R. RICHEY, District Judge.

Pursuant to Fed.R.Crim.P. 29, Defendant Candysha Robinson renews her Motion for a Judgment of Acquittal with respect to her conviction for using or carrying a firearm in relation to the offense of unlawful possession with intent to distribute cocaine base within 1,000 feet of a school in violation of 18 U.S.C. § 924(c).[1] Upon

[1] Candysha Robinson was convicted of: Count I-distributing crack cocaine on July 15, 1991 in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(C) and 18 U.S.C. § 2; Count II-distributing crack within 1,000 feet of a public school on July 15, 1991 in violation of 21 U.S.C. § 841(a)(1), 841(b)(1)(C), and 860(a), and 18 U.S.C. § 2; Count III-possession with intent to distribute 5 or more grams of cocaine base on July 16, 1991 in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(B)(iii), and 18 U.S.C. § 2; Count IV-possession with intent to distribute 5 or more grams of cocaine base within 1,000 feet of a school on July 16, 1991 in violation of 21 U.S.C. § 841(a)(1), 841(b)(1)(C), and 860(a), and 18 U.S.C. § 2; Count V-using or carrying a firearm in the course of the offenses charged in Counts III and IV in violation of 18 U.S.C. § 924(c) and 21 U.S.C. § 841(a)(1), 841(b)(1)(C), and 860(a), and 18 U.S.C. § 2; Count VI-knowingly making available for use a building, room or enclosure for the purpose of using, storing, manufacturing or distributing cocaine base on or about July 16, 1991 in violation of 21 U.S.C. § 856(a) and 18 U.S.C. § 2. The Government provided a reformed Indictment at trial, and the Court refers to the numerical ordering of the charges as set forth therein.

consideration of the Defendant's Motion, the record herein, and the applicable law, the Court denies the Motion.

The Court must deny a motion for judgment of acquittal when, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Poston*, 902 F.2d 90, 94 (D.C.Cir.1990) (emphasis in original) (*quoting Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979)). "When a reasonable mind might fairly have a reasonable doubt of guilt or might fairly have none, the decision is for the jury to make." *United States v. Herron*, 567 F.2d 510, 514 (D.C.Cir.1977); *see also United States v. Harrison*, 931 F.2d 65, 71 (D.C.Cir.1991) ("We do not determine whether we would find guilt beyond a reasonable doubt, but only whether a reasonable jury could find guilt beyond a reasonable doubt"). This standard recognizes that courts give "full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact." *United States v. Reese*, 561 F.2d 894, 898 (D.C.Cir.1977); *see also United States v. Sutton*, 801 F.2d 1346, 1358 (D.C.Cir. 1986). Because the jury is entitled to draw reasonable inferences from the evidence presented, "there is no requirement of direct evidence against the defendant; the evidence may be entirely circumstantial." *Poston, supra*, 902 F.2d at 94, n. 4; *see also United States v. Simmons*, 663 F.2d 107, 108 (D.C.Cir.1979). In short, courts review a jury's determination "very deferentially." *Harrison, supra*, 931 F.2d at 71.

The Defendant makes two basic contentions in support of her Motion. First, the Defendant claims that the evi-

dence was insufficient to sustain a finding that she possessed the firearm, and therefore, she could not have used or carried the gun in relation to the offense. *See United States v. Long*, 905 F.2d 1572, 1576 (D.C.Cir.1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 365, 112 L.Ed. 2d 328 (1990). Second, relying upon *United States v. Bruce*, 939 F.2d 1053 (D.C.Cir.1991), the Defendant contends that, even if she did possess the firearm, the Government did not adduce sufficient evidence to prove beyond a reasonable doubt that she, or anyone else, used or carried the gun in relation to the drug trafficking crime. A closer review of the evidence presented at trial demonstrates the weakness in both of these arguments, and convinces the Court that there was sufficient evidence upon which a rational juror could convict.

Even under the case precedent relied upon by the Defendant, the evidence amply supports the jury's finding that Candysha Robinson possessed the gun. In *United States v. Long*, 905 F.2d at 1577, the Court reversed a conviction for using or carrying a firearm in relation to a drug offense because the record was "devoid of *any* evidence linking Long to the revolver in the sofa, other than his presence in the apartment and involvement with narcotics." (emphasis in original). In *Long*, the Court found it especially significant that there was no evidence that Long knew of the gun's existence, and no evidence that Long owned, leased or lived at the premises. *Id.* at 1576. In order to demonstrate how the Government could make a case of constructive possession, the *Long* Court pointed to *United States v. Anderson*, 881 F.2d 1128 (D.C.Cir.1989). In *Anderson*, there was "substantial evidence" linking the Defendant to the gun. *Long*, 905 F.2d at 1578. This "substantial evidence" consisted of evidence that the Defendant lived in the apartment, testimony that the Defendant had keys to the bedroom in which the gun was located, and the fact that the Defendant's wallet and photographs were found in the bedroom. *Id.* The fact that the Defendant in *Anderson*

lived at the premises was "[o]f paramount importance" and "justified an inference that [the Defendant] constructively possessed the apartment's contents." *Id.*

The evidence supporting the jury's inference that Candysha Robinson possessed the drugs and the gun in the locker is almost as strong as the evidence in *Anderson, supra*, and certainly more convincing than the case against the Defendant in *Long, supra*. Here, it is undisputed that Candysha Robinson lived at the premises and was the lessee. *See* Gov't Exhibit 15 (rent receipts in name of Candysha Robinson). Furthermore, the Defendant admits that she owned the locker and used it to store her personal items, including her tax returns. *See* Transcript, Vol. I. at 133.[2] (hereinafter, "Tr.") On the basis of this evidence, a reasonable jury could conclude that the Defendant knew of, and had at least constructive possession of, the items in the trunk. *See Anderson, supra.*

Defendant seeks to avoid this conclusion by arguing that a codefendant, Kwarme Parker,[3] allegedly possessed the key to the locker and also "owned" the drugs and gun found therein. This argument fails. First, the Government introduced evidence at the trial which showed that, in a prior drug transaction at the premises, Candysha Robinson and her sister entered the bedroom when a buyer (who turned out to be an undercover officer) inquired about the availability of drugs. Peering inside the bedroom, the officer saw Candysha Robinson hand a

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[2] This portion of the transcript reads:

Q: Was there a trunk that was in your room?
A: Yes, that was my trunk, where I kept all of my important papers and grade papers, and I store my junk in that chest.
Q: Did you have your tax returns in that trunk?
A: Everything.

[3] Mr. Parker pled guilty to certain charges in the Indictment prior to Ms. Robinson's trial.

rock of cocaine to her sister. After the Defendant's sister emerged from the bedroom, she sold the rock of crack cocaine to the undercover officer. *See* Tr. Vol. I. at 7 (testimony of Officer Hale). This testimony could indicate to a reasonable juror that Candysha Robinson had knowledge of the drugs being sold in her house and also presents circumstantial evidence that the Defendant was keeping drugs in her bedroom.

In a second sale, another lodger in the Defendant's apartment, Kwarme Parker, sold crack cocaine to an undercover officer. According to Officer Hale's testimony, Parker went to the Defendant's apartment in order to retrieve the drugs. Tr.Vol. I. at 8-9. The police recovered from the trunk in the Defendant's bedroom the marked money used to buy the drugs in this second transaction. *Id.* at 9-11. From this second transaction, the jury could infer that the drugs which Candysha Robinson transferred to her sister in the first transaction were stored in the same place—the locker—as were the drugs, cash and gun later confiscated by the police upon execution of a search warrant.

Finally, based on her ownership of the locker, her decision to allow Parker to have keys to the locker, and her own admitted suspicions about Parker's drug use, *see* Tr.Vol.I. at 131-133, the jury could reasonably infer that Ms. Robinson knew that Mr. Parker was storing the drugs and gun in the locker. Even though Defendant gave a key to Mr. Parker, she had access to the locker as well. In fact, the Defendant admitted that she last used the locker on the Sunday night prior to the execution of the search warrant. Tr.Vol. I. at 136. These facts, in addition to evidence indicating the Defendant's role in a prior drug sale at the house, are sufficient to establish constructive possession of the drugs and the gun by Ms. Robinson. *See Anderson, supra; United States v. Jenkins,* 928 F.2d 1175, 1179 (D.C.Cir.1991) (jury entitled to find that, although drugs were hidden from view, the

Defendant who owned the house was on constructive notice of them).[4]

The case precedent in *United States v. Bruce,* 939 F.2d 1053 (D.C.Cir.1991) does not undermine the verdict rendered by the jury in this case. In *Bruce,* the Court of Appeals held that mere possession of drugs and a gun in close proximity does not necessarily establish that the gun was "used in relation to" the drug offense. *See Bruce,* 939 F.2d at 1054 ("mere possession of a gun at the time the crime is committed is not enough to establish use"). Rather, when the defendant is charged with possession with intent to distribute drugs, the Government must prove that the defendant actually used the gun to assist in that act of *possession.* Evidence which suggests that the defendant would use the gun at some unknown point in the future when distributing the drugs is insufficient to sustain a conviction under 18 U.S.C. § 924(c). *Id.* at 1055. According to the Court of Appeals, this standard is the only way to fairly apply the term "use * * * in relation to" the drug offense when the predicate offense is as elastic as possession with intent to distribute. *Id.* ("Since possession with intent to distribute is in a sense a passive crime, it becomes somewhat difficult analytically to determine how one goes about using a gun in relation to that crime.")

However, the Court of Appeals acknowledged that, in crack houses, drug dealers use guns to protect the ongoing possession of the drugs being sold there. The Court explained the uniqueness of the crack house scenario for purposes of § 924(c):

> If guns are strewn around a "crack house" in which drugs are stored, it might be inferred that the guns

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[4] At the very least, this evidence is sufficient to establish that Ms. Robinson aided and abetted Mr. Parker's possession of the drugs and the gun by allowing him to store these materials in her home. *See United States v. Jenkins, supra; United States v. Raper,* 676 F.2d 841, 849 (D.C.Cir.1982). *Cf. United States v. Poston,* 902 F.2d 90 (D.C.Cir.1990) (Thomas, J.).

> are there to protect the occupant's "possession." In such a case, the guns are "used" in relation to the drug trafficking crime of possession with intent to distribute because they are intended to protect the stash of drugs that will subsequently be distributed. And although actual distribution is a separate crime, courts have treated evidence of the use of guns in such a house for protection of the distribution function as equivalent to protection of possession. Since in the typical crack house possession and distribution are intertwined, that seems to us to be a logical interpretation of the statute.

Id. (citations omitted).

Given this standard, it is easy to understand why the Court of Appeals vacated Bruce's conviction for using a gun in relation to the possession with intent to distribute offense. In *Bruce*, upon execution of a search warrant, the police found numerous ziplock bags and a fully-loaded .22 caliber Derringer revolver in the pockets of Bruce's trench coat, located inside the closet door next to the front door of the house. The gun was enclosed in a belt buckle found inside of a brown paper bag. Bruce lived in the house with his mother and other family members. The residence was not a "crack house", as there was no evidence that drug sales occurred there. The Court invalidated the conviction under § 924(c) because there was no evidence that Bruce would use the gun in relation to his possession of the drugs at the house. Based upon the evidence, the Court concluded that, at most, Bruce would use the gun only when distributing drugs elsewhere sometime in the future. Because "use" of the gun is required by the clear terms of the statute, an "intent to use" the gun in the future does not suffice.

Defendant Robinson's gun conviction survives the *Bruce* precedent because she was also convicted of maintaining a "crack house" in violation of 21 U.S.C. §856

(a) and 18 U.S.C. § 2.[5] As explained in *Bruce*, the fact that the premises was a base for the distribution of crack cocaine permits the inference that the gun was used to facilitate the possession with intent to distribute. Based upon the evidence describe above, the evidence was sufficient for the jury to convict the Defendant of using or carrying the firearm in the course of the offense of unlawful possession with intent to distribute cocaine base within 1,000 feet of a school.

Defendant claims that this case cannot fit within the contours of *Bruce* and *Anderson* because the weapon was in a locked trunk and was not readily available for use. This fact is not as critical as the Defendant implies. In *Anderson, supra*, the shotgun was inside of a bag on the floor in a bedroom which was apparently kept locked, as evidenced by the presence of a key inside the bedroom door at the time of the arrest. *See* 881 F.2d at 1141. Moreover, the Defendant in *Anderson* was not in the bedroom in which the police confiscated the shotgun. *Id.* at 1140. Thus, the fact that someone had to undertake special steps to obtain the weapon—entering the bedroom, possibly unlocking the door, and opening the bag—did not preclude the *Anderson* court from finding that the gun was used in relation of the drug trafficking offense. Likewise, in this case, there is evidence upon which the jury could legitimately infer that the Defendant had access to the gun in the trunk, and could use the gun to protect the stash of drugs and the proceeds of drug sales

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[5] Although Defendant does not directly challenge the "crack house" conviction, the instant Motion implicitly levels such an attack. Defendant claims that the amount of drugs and money does not comport with the typical drug house. This argument fails; it ignores the fact that two prior isolated transactions occurred at the premises, a fact which expressly distinguishes this case from *Bruce*. Defendant also ignores Detective Stroud's testimony that crack houses come in many varieties. *See* Tr.Vol. I. at 75-77.

should the need arise. This is all that *Bruce* requires.[6] *See also United States v. Evans*, 888 F.2d 891, 896 (D.C.Cir.1989) ("when guns are present in order to protect contraband they may be deemed to be used in relation to the underlying felony.")

Accordingly, for all of these reasons, the Defendant's Motion for Judgment of Acquittal shall be, and hereby is, DENIED.

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[6] Although the gun in this case was a Derringer, the Government's evidence does not suffer from the same infirmity as did the Government's case in *Bruce, supra*. *See* 939 F.2d at 1055. Unlike *Bruce*, the Government here has presented testimony as to the usefulness of the Derringer as a "second gun" in protecting the stash. *See* Tr.Vol. I. at 77-79 (testimony of Detective Stroud).

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 92-3062

UNITED STATES OF AMERICA,
Appellee,

v.

CANDISHA S. ROBINSON,
Appellant.

Appeal from the United States District Court
for the District of Columbia, Crim. No. 91-0453

Argued Dec. 7, 1992

Decided June 18, 1993

Order Granting Rehearing En Banc and
Vacating Judgment Oct. 8, 1993

Before: MIKVA, Chief Judge, SILBERMAN and HENDERSON, Circuit Judges.

Opinion for the Court filed by Chief Judge MIKVA.

Dissenting opinion filed by Circuit Judge HENDERSON.

MIKVA, Chief Judge:

Candisha Robinson was convicted after a jury trial of numerous drug-related offenses including "us[ing] or

carry[ing] a firearm" during and in relation to a drug trafficking offense, in violation of 18 U.S.C. § 924(c)(1). Ms. Robinson concedes that the evidence was sufficient to support a finding that she constructively possessed the unloaded derringer found in the locked trunk in her apartment, but argues that her conviction under section 924(c)(1) should be reversed because the evidence failed to establish that the gun was actually used during and in relation to the drug trafficking offenses for which she was convicted. Ms. Robinson also contends that the district court erroneously increased her sentence by two points on the grounds that she was a "supervisor" to a drug trafficking scheme, and erroneously imposed a $300 rather than a $200 special assessment fee. We agree with appellant, with respect to all three arguments, and therefore reverse her conviction under section 924(c) and remand to the district court for resentencing.

I.

According to the government's evidence, on July 15, 1991, Officer Larry Hale approached appellant's sister, Veloria Robinson, and told her that he wished to buy some crack cocaine. Veloria took Officer Hale to Apartment 3, 1722 West Virginia Avenue, N.E. and knocked on the door. When appellant Candisha Robinson opened the door, Veloria explained that Officer Hale was trying to get something. Candisha asked him what he wanted. Officer Hale said that he wanted a "twenty" and followed Veloria into the apartment. Officer Hale saw Veloria and Candisha go into the apartment's one bedroom and observed Candisha hand Veloria a rock of crack cocaine. Veloria then gave the rock to Officer Hale in exchange for $20 in marked money.

The next evening, Officer Hale returned to the apartment. As he was walking up the steps, he was approached by a man named Kwarme Parker. Parker stated that Veloria was inside the apartment, but that he also lived in the apartment and could serve him. Parker went into

the apartment while Officer Hale waited in the hallway outside the front door. When Parker returned to the hallway, he gave Officer Hale a small rock of crack cocaine in exchange for marked money.

About thirty minutes later, a search warrant was executed at the apartment. Inside a locked trunk in the bedroom closet, the police found a .22-caliber derringer and holster, a 1990 tax return signed by Candisha, a letter from Candisha's employer, two rocks of crack cocaine weighing a total of 10.88 grams, $20 in marked money from the sale of cocaine made by Mr. Parker, and $42.80 in other cash. Other papers bearing appellant's name were found in other parts of the bedroom, including a lease which identified appellant and another man as the principal lessees. A plastic cassette tape case was also found in the bedroom which contained a quantity of plastic ziplock bags.

At trial, the government called an expert witness, Detective David Stroud, who testified that the rock of cocaine in the locked trunk would have a $700-800 street value, as-is, but at $1400 value if it was broken down into $20 chunks. With respect to the firearm found in the apartment, Detective Stroud characterized the .22-caliber derringer as a "second gun"—the kind of gun a drug dealer might hide on his person for use until he could get to his "real gun." Mr. Stroud also testified that guns are generally used by drug dealers to protect themselves from rival drug dealers, the police, and employees within the organization.

When asked to describe a "crack house," Detective Stroud explained that there are two basic varieties. In the first type of crack house, he said, drugs are "manufactured on the premises, cut up and bagged up for street-level distribution." He added that "maybe in some cases they even sell drugs from the premises." However, Detective Stroud noted, this would be taking "a very big risk because you're inviting a raid . . . unlike selling on

the street." In the other type of crack house, people come just to smoke the drug. "There may be some limited selling of the drug going on, and they even rent the pipes to you for $2 a pipe in some of them."

Ms. Robinson took the stand in her defense. She admitted that she leased the apartment and received rent money from her sister Veloria, Kwarme Parker, and Sharine McKinney. She also acknowledged that she owned the foot-locker in which the derringer and crack were found, and that she knew that Ms. McKinney used drugs, and that Mr. Parker was selling drugs (but not out of her apartment). Ms. Robinson insisted that she had no knowledge of the drugs or the derringer found in her footlocker. She explained that she had taken Mr. Parker in temporarily because he had no place to go, but had become upset with his drug-dealing and had given him two weeks to find somewhere else to stay. She admitted allowing him to use the footlocker to safeguard his money, but claimed that she tried to prevent him from bringing drugs into her apartment by searching him and inspecting the footlocker regularly. This account was corroborated in significant respects by the testimony of Ms. Bey and Ms. McKinney. Both of them testified that appellant refused to allow Mr. Parker to sell drugs from the apartment; Ms. McKinney specifically recalled that appellant often searched Mr. Parker when he entered the apartment to ensure that he was not carrying drugs.

Ms. Robinson presented an alibi for the distribution charge. She testified that she was not in the apartment on the evening of July 15 because she was spending the night with her boyfriend in a motel. Her boyfriend, Mr. Founteroy, corroborated this story by testifying that they spent the day together going fishing and then spent the night together at a hotel. This alibi was partially contradicted by Ms. McKinney, who testified that she thought appellant was home for part of the evening, until about 10 P.M., which was almost an hour after Officer Hale said he saw appellant recover drugs from the bedroom.

Lastly, appellant read to the jury a portion of the transcript from Veloria Robinson's plea hearing. At the plea hearing, Veloria Robinson stated that it was her girlfriend, not appellant, who retrieved the crack that she sold to Officer Hale on July 15. In rebuttal, the government introduced testimony of an officer who stated that he was unable to find an original receipt for the hotel at which appellant and her boyfriend claimed they stayed on July 15.

Appellant Candisha Robinson was found guilty on all six counts of the indictment, including distribution of cocaine base, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C); possession with intent to distribute a quantity of cocaine base in excess of five grams, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B)(iii); commission of the charged drug offenses within 1000 feet of a school, in violation of 21 U.S.C. § 860(a); maintenance of a building for the purpose of manufacturing, storing, distributing or using cocaine base, in violation of 21 U.S.C. § 856(a); and use or carrying of a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. § 924(c)(1).

Ms. Robinson submitted a post-verdict motion for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c) directed solely to the count charging her with violating section 924(c)(1). Judge Richey denied the post-verdict motion in a memorandum opinion and order filed on December 18, 1991. 779 F.Supp. 606. At the sentencing hearing, Judge Richey adopted the Probation Officer's recommendation that Ms. Robinson's offense level be increased by two, from 28 to 30, because the evidence suggested that she was a "supervisor" of the drug trafficking scheme. Ms. Robinson was sentenced to a total of 157 months imprisonment, a four year term of supervised release and a special assessment of $300.

II.

Ms. Robinson challenges the sufficiency of the evidence to support her conviction under section 924(c). *See* 18 U.S.C. § 924(c)(1). Ms. Robinson concedes that the evidence was sufficient to support a finding that she constructively possesed the derringer found in the locked trunk in her bedroom closet, but argues that the evidence failed to establish that she actually "used" the gun "during and in relation to" the drug trafficking offenses for which she was convicted—as required by section 924(c)(1). The government, for its part, does not argue that Ms. Robinson carried, brandished or otherwise used the derringer during or in relation to the distribution of the drugs to Officer Hale. Rather, the government argues that we should affirm Ms. Robinson's conviction because Ms. Robinson's apartment was a "crack house," and in crack houses, the mere proximity of a gun to drugs is sufficient to support the inference that the defendant used the gun to protect the possession of the drugs.

When reviewing these respective claims, we are, of course, bound to view the evidence in the light most favorable to the government and respect the right of the jury to determine the credibility of witnesses, weigh evidence, and draw justifiable inferences of fact. *United States v. Williams*, 952 F.2d 418, 419 (D.C.Cir.1991). Indeed, it is well established that this Court must defer to the jury's determination and affirm if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). In our effort to determine whether there was sufficient evidence to support the essential elements of section 924(c), we turn first to the language of the statute. Section 924(c) states, in pertinent part:

> Whoever, during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such . . .

> drug trafficking crime, be sentenced to imprisonment for five years.

On its face, section 924(c) conspicuously fails to criminalize mere possession of a firearm during and in relation to a drug trafficking offense; the statute reserves punishment only for those individuals who actually carry or "use" a firearm during and in relation to an illicit drug offense. Given the way section 924(c) is drafted, even if an individual intends to use a firearm in connection with a drug trafficking offense, the conduct of that individual is not reached by the statute unless the individual actually uses the firearm for that purpose. As explained succinctly in *United States v. Bruce*, 939 F.2d 1053, 1055 (D.C.Cir.1991), "Congress did not make it a crime to possess a gun with the *intent* to use it in relation to a drug trafficking crime. Instead, section 924(c) only makes it a crime to *use* a gun in relation to a drug trafficking crime."

Initially, the distinction between intended use and actual use may appear to put quite a hurdle in the path of a prosecutor seeking a conviction under section 924(c), particularly in cases such as this, where the primary drug offense underlying the conviction is possession with the intent to distribute. (There is absolutely no evidence that the gun played any role in the distribution of drugs to Officer Hale.) As this Court remarked in *Bruce*, it can be "somewhat difficult analytically to determine how one goes about using a gun in relation to that crime." *Id.* It is important to keep in mind, however, that even in cases where the underlying drug offense is possession with the intent to distribute, the government is not limited to evidence indicating that the defendant fired, brandished, or carried the firearm. *Cf. United States v. Evans*, 888 F.2d 891, 896 (D.C.Cir.1989), *cert. denied*, 494 U.S. 1019, 110 S.Ct. 1325, 108 L.Ed.2d 500 (1990). We have also identified numerous other factors which may be probative of actual use, including the accessibility

of the firearm, the type of firearm, the number of firearms, the proximity of the firearm to the drugs, and whether the firearm was loaded or previously had been used. *See United States v. Morris*, 977 F.2d 617 (D.C. Cir.1992). Although these factors are not automatically determinative of actual use, they can help the government to prove, as it must, a "nexus . . . between a particular drug offender and the firearm," *United States v. Long*, 905 F.2d 1572, 1577 (D.C.Cir.1990), *cert. denied*, 498 U.S. 948, 111 S.Ct. 365, 112 L.Ed.2d 328 (1990), and that "the guns facilitate[d] the predicate offense in some way." *United States v. Jefferson*, 974 F.2d 201, 205 (D.C.Cir.1992) (quoting *United States v. Harris*, 959 F.2d 246, 261 (D.C.Cir.1992)).

In this case, most of the factors we have identified in previous section 924(c) cases cut against the affirmance of appellant's conviction. First, there is absolutely no evidence that Ms. Robinson has ever brandished or previously used the firearm found in the locked trunk. *Cf. Evans*, 888 F.2d at 896 (evidence that the gun was used to threaten a subordinate suggests actual use for purposes of section 924(c)); *Jefferson*, 974 F.2d at 207. Second, although it is unclear whether Ms. Robinson had the key to the lock on the trunk, the gun certainly was not easily accessible since it was in the bedroom closet in a locked footlocker. Thus, this case stands in sharp contrast to cases like *Morris* where the firearm was within "easy reach," *see Morris*, 977 F.2d at 623, as well as *Jefferson* where the appellant placed the gun in the back yard so that people who needed the gun in relation to drug activity could have easy access. *Jefferson*, 974 F.2d at 207 (admission that the gun was previously used to protect possession of drugs supported section 924(c) conviction).

Still, the government contends that the gun was used by Ms. Robinson to protect her stash of drugs in the locked trunk. We fail to see, however, how the gun—being in a locked trunk in a bedroom closet—would be

of any help to Ms. Robinson in the event of an emergency. In order to brandish the gun, Ms. Robinson would have to run to the closet, unlock the trunk, open the trunk and grab the gun. *See United States v. Derr*, 990 F.2d 1330, 1337-38 (D.C.Cir.1993) (essential element of "use" under section 924(c) not established where the closet would have to be unlocked with keys before the gun would be accessible). Even at that point, the gun would be of virtually no use to Ms. Robinson since it was unloaded and there was no ammunition for it anywhere in the apartment. *Cf. United States v. Anderson*, 881 F.2d 1128, 1141 (D.C.Cir.1989) ("presence of loaded guns and ammunition" is pertinent evidence of actual use of firearms); *Morris*, 977 F.2d at 622 ("the fact that a gun is loaded strengthens the inference that it is actual use"). The fact that the gun was unloaded, locked away, and without ammunition anywhere on the premises, strongly suggests that Ms. Robinson had no *intention* of using the gun at that time.

Finally, we have specifically drawn distinctions between a small derringer, like the one at issue in this case, *see Bruce*, 939 F.2d at 1055, and a sawed-off shotgun, which we have recognized as a "formidable firearm" for the protection of a stash of drugs. *Jefferson*, 974 F.2d at 208. Even the government's drug expert, Officer Stroud, confessed to the jury that the derringer recovered from the locked footlocker was not the type of gun a drug dealer ordinarily would use to protect a stash of drugs. It is also worthy of note that only one gun was found on the premises. While the use of a single gun can violate the statute, *see Jefferson*, 974 F.2d at 207, when evaluating the sufficiency of the evidence under section 924(c), we have expressly distinguished the possession of a single gun from the possession of an "arsenal" of weapons. *See Anderson*, 881 F.2d at 1141; *Morris*, 977 F.2d at 622.

In short, the possession of this single, unloaded .22-caliber derringer found in a locked trunk in a bedroom closet falls significantly short of the type of evidence we

have held to establish actual use under the statute. In fact, we have reversed convictions under section 924(c) where there was stronger evidence against the defendant than that which is present here. In *United States v. Bruce*, 939 F.2d 1053 (D.C.Cir.1991), for example, we carefully explored the distinction between intended use and actual use under section 924(c), and concluded that although the police found a stash of drugs next to a fully loaded .22-caliber derringer in the pocket of the appellant's trench coat, the evidence was insufficient to support the conviction under the statute. We noted that the appellant lived in the apartment with his mother and other family members, and that his gun was stored in a belt buckle found inside a brown paper bag. We held that the only reasonable view of the evidence was that the appellant would use the gun only when distributing drugs elsewhere, away from his family's apartment, sometime in the future.

We also reversed the appellant's conviction in *United States v. Derr*, 990 F.2d 1330 (D.C.Cir.1993), a case which is remarkably similar to this one—save the fact that a more powerful gun and ammunition were recovered by the police in that case. In *Derr*, an unloaded, holstered, .357 Magnum revolver was found by police in a locked closet in close proximity to nine rounds of .357 ammunition. The gun and ammunition were on top of a locked box containing 18.4 grams of crack cocaine and drug paraphernalia. Although the evidence in *Derr* firmly supported the conclusion that the appellant planned to use the gun in the future when distributing the drugs contained in the locked box, the inaccessibility of the gun in the locked closet, and the fact that the gun was unloaded, fatally undermined the government's theory that the defendant actually used the firearm to protect his current possession of drugs.

Despite the precedent militating in favor of reversal here, and the obvious shortcomings in the record evidence, the government argues that a rational juror still could

have inferred actual use of the firearm in this case because Ms. Robinson's apartment was a "crack house." In the government's view, this case is analogous to *United States v. Williams*, 952 F.2d 418 (D.C.Cir.1991), and *United States v. Anderson*, 881 F.2d 1128 (D.C.Cir. 1989), where convictions were upheld under section 924(c) because the proximity of the firearms to the drug paraphernalia in the "crack houses" strongly indicated that the guns were there to protect the occupants' possession of the drugs.

We do not dispute that "crack houses" present unique considerations for the purposes of section 924(c). In crack houses, unlike ordinary residences, it is reasonable to assume that readily accessible guns found on the premises are being used to protect the drugs stored there. As we noted in *Bruce*, "[i]f guns are strewn around a 'crack house' in which drugs are stored," one may infer "that the guns are there to protect the occupant's possession" of drugs. *Bruce*, 939 F.2d at 1055. *See also Jefferson*, 974 F.2d at 208 (in the context of crack houses, "protection of a drug operation may be presumed from the amount of firepower discovered on the premises").

Yet not every apartment or home that contains crack cocaine is a "crack house." As the government's expert explained, crack houses are much more than simply places where crack cocaine may be found. Crack houses are typically places where large quantities of crack cocaine are manufactured or where people come for the purpose of smoking the drug. Although the government asserts that Ms. Robinson's apartment fits within the expert's first definition of a crack house—a house maintained for the purpose of manufacturing large quantities of crack cocaine—none of the typical indicia of such a crack house was found on the premises. No scales, razor blades, equipment, or ingredients were found anywhere in the apartment. The small quantity of baggies found

in the apartment is consistent with the evidence that some persons residing in the apartment were selling small amounts of crack cocaine, not with the operation of a "crack house" of the type described by the government's expert witness. We also note that although the appellant was convicted of maintaining a building for the purpose of manufacturing, storing, distributing, or using cocaine base, in violation of 21 U.S.C. § 856(a), that statute is extremely broad and certainly not limited to "crack houses."

More importantly, even if Ms. Robinson's apartment was a "crack house," the mere presence of one or more factors generally indicative of actual use of a firearm does not automatically establish "use" under the statute. *See Bruce*, 939 F.2d at 1055 (although the defendant constructively possessed a loaded gun which was accessible and in close proximity to drugs, the conviction under section 924(c)(1) was reversed because the evidence merely suggested intended, not actual, use). The dissent mistakenly suggests that the mere proximity of a gun to drugs is sufficient to support a conviction under section 924(c) where the underlying offense is a violation of 21 U.S.C. § 856(a). *See* Dissent at 896. In fact, according to the dissent's logic, possession of any kind of gun anywhere in a crack house makes out a section 924(c) violation. That cannot be so. Where the evidence indicates that the gun recovered from a crack house was not actually used in relation to drug activity, a conviction under section 924(c) may not stand. Even in *Anderson* and *Williams* (which the dissent cites approvingly), the guns were not only in close proximity to drugs, but were also powerful, loaded and easily accessible.

Unlike *Williams*, this case does not involve a "slew of weapons [and] ammunition" in close proximity to a large quantity of drugs. *Williams*, 952 F.2d at 419. Nor does this case involve guns that are strewn around a crack house in easy reach or in plain sight, as in *Anderson*. *Anderson*, 881 F.2d at 1140. This case involves a single,

unloaded, .22-caliber derringer stored in a locked trunk with a stash of drugs. Apparently, the gun was never brandished or even removed. And while the government is free to buttress its evidence of "use" by expert testimony identifying the indicia of a drug trafficking operation, *see Morris*, 977 F.2d at 622, in this case, the government's expert witness hurt, rather than helped, the prosecutor's case. Not only did the expert's definition of a "crack house" wholly fail to describe Ms. Robinson's apartment, the expert also explicitly stated that a derringer is not the type of weapon a drug dealer would generally rely upon to protect a stash of drugs. Under these circumstances, we are compelled to conclude that this case is controlled by our decisions in *Bruce* and *Derr* rather than *Anderson* and *Williams*. The only reasonable view of the evidence in this case is that the gun was intended for use at some future date.

We note that the dissent argues that *Bruce* and *Derr* are distinguishable from this case because Ms. Robinson was convicted of a distribution offense whereas the defendants in *Bruce* and *Derr* were not. *Bruce*, 939 F.2d at 1056; *Derr*, 990 F.2d at 1333. While, in general, it may be easier to establish actual use in cases where the underlying offense is distribution (as opposed to possession with intent to distribute), in this case, there is absolutely no evidence, aside from the mere proximity of the derringer to the stash of drugs, that the gun played any role whatsoever in Ms. Robinson's distribution of drugs to Officer Hale.

If there were evidence that a loaded gun was in reach of Ms. Robinson at the time of distribution, this would be a different case. But there is no such direct evidence. The gun was unloaded and found the day after Ms. Robinson sold the crack. Plainly, the jury can not legitimately infer that even the unloaded gun was in Ms. Robinson's reach the day before. That is just speculation.

Moreover, mere proximity of a gun to drugs is not, and has never been, sufficient to support a conviction under

section 924(c) in this circuit. As we explained in *Morris*, the proximity of a gun to drugs "may cut either way, depending upon the particular facts." *Morris*, 977 F.2d at 622. Nevertheless, the dissent contends that where distribution is an underlying offense, little regard need be given to whether the gun was loaded or unloaded, locked in a safe or in plain view; nor must we consider any of the other factors this Court has identified as relevant in section 924(c) cases. *See Morris*, 977 F.2d at 621-23 (and cases cited therein). The theory, the dissent advances would require us to uphold a conviction under section 924(c) whenever the defendant is convicted of a distribution offense and the defendant's gun is found in close proximity to drugs. In the dissent's view, this practice would be justified, regardless of the surrounding circumstances, since it is possible to speculate that the defendant was "emboldened" by the possession of the gun to commit the distribution offense. *See* Dissent at 895-96 (quoting *United States v. Stewart*, 779 F.2d 538, 540 (9th Cir.1985)). Although this may, indeed, be the dissent's preferred result, the dissent is unable to cite a single case in this circuit which holds, or even hints, that mere proximity of a gun to drugs, and nothing more, is sufficient to support a conviction under section 924(c). The result urged by the dissent is particularly remarkable given that all the other factors identified as relevant by this Court cut the other way. Perhaps this is the reason the government never pushed this novel argument on appeal.

III.

Ms. Robinson also challenges the district court's sentencing determination. The district court explicitly adopted the Probation Officer's recommendation that Ms. Robinson's offense level should be increased by two points, from 28 to 30, because she played the role of a "supervisor" to a drug trafficking scheme. *See* U.S.S.G. § 3B1.1(b). The Probation Officer based this conclusion on two factors: 1) Ms. Robinson had "allowed her apartment to be used for storing drugs and money," and 2) Ms. Robinson had "advised her sister, Veloria Robinson, to get drugs for the undercover officer."

The government now admits that the second factor relied upon by the Probation Officer is factually inaccurate. The government's evidence clearly showed that it was Veloria Robinson who asked appellant to get the $20 rock for Officer Hale, not the other way around. Had the district court offered an additional explanation for its determination that appellant was a "supervisor," other than its explicit adoption of the Probation Officer's conclusion, reversal of the sentencing determination would not be so clear. However, the district court stated only that it adopted the Probation Officer's report "as part of the court's findings," and cryptically added that "the defendant was at least in the apartment in question before the instant offense." Since the court clearly relied on a misstatement of fact when adopting the Probation Officer's conclusions, we remand for a reconsideration of whether Ms. Robinson was, in fact, subject to an increase in her offense level for being a "supervisor."

Finally, Ms. Robinson objects to the district court's failure to reduce her special assessment from $300 to $200 after it vacated Count Three and Count Seven of the original indictment. Since the government concedes that Ms. Robinson should have been subjected to only four special assessments of $50 each, pursuant to 18 U.S.C. § 3013(a)(2)(A), we direct the district court on remand to reduce the special assessment accordingly.

Reversed and remanded.

KAREN LeCRAFT HENDERSON, Circuit Judge, concurring in part and dissenting in part:

I concur in the remand to reconsider whether Candisha Robinson (Robinson) acted as a "supervisor" within the meaning of U.S.S.G. § 3B1.1(c) and to reduce the special assessment from $300 to $200 pursuant to 18 U.S.C.

§ 3013(a)(2)(A). I dissent because in my view this case is distinguishable from *United States v. Bruce*, 939 F.2d 1053 (D.C.Cir.1991), and *United States v. Derr*, 990 F.2d 1330 (D.C.Cir.1993), the cases upon which the majority primarily relies. Moreover, in concluding that Robinson did not "use" a firearm "in relation to" a drug trafficking crime, 18 U.S.C. § 924(c)(1), the majority opinion perpetuates this court's misuse of two factors—the number and the firepower of the firearm(s) used. Neither of these factors is mentioned in the statutory language nor does either affect the "use" of a firearm.

As the majority notes, Officer Hale made two purchases from Robinson's apartment. On July 15, 1991, Veloria Robinson, Robinson's sister, took Hale to the apartment. After her sister knocked on the front door, Robinson answered and asked what Hale wanted. He asked for a "twenty" and stood in the entrance of the apartment as the two sisters went into the apartment's only bedroom. Hale observed Robinson hand her sister, Veloria, a rock of crack cocaine. Veloria Robinson came out of the bedroom and gave Hale the crack; he paid her with marked money. The next evening Hale returned to make another purchase. This time Kwarme Parker, Robinson's tenant, approached him outside the apartment. Parker indicated that Veloria Robinson was inside the apartment and that he could serve him. Parker went inside while Hale waited outside. Parker returned and exchanged a rock of crack for marked money. Hale did not see Robinson during this sale.

Thirty minutes later, the police executed a search warrant for the apartment. Robinson was then present. Inside a locked trunk in the bedroom closet, the police found 10.88 grams of crack cocaine with an estimated street value of $1,440, the marked money from the Parker drug sale, another $42.80, various personal papers containing Robinson's name and a holstered .22 caliber

derringer. In the bedroom, the police also found a plastic case for a cassette tape that contained numerous ziplock bags.

At trial, Robinson took the stand in her defense. She claimed that on July 15, she was out of town during the day and stayed overnight in a local motel. She admitted that she owned the trunk and used it to store many of her belongings. She testified that she looked inside the trunk each day [1] and that the last time she examined it before her arrest was the night of July 14. According to her testimony, she frisked Parker, who also lived in the apartment, each time he entered the apartment because she suspected that he was selling drugs. Finally, Robinson maintained that she had never seen the gun or any drugs in her apartment.

Robinson was convicted on all six counts of the indictment: one count of possession with intent to distribute more than five grams of cocaine base in violation of 18 U.S.C. §§ 841(a)(1) and (b)(1)(C), one count of possession with intent to distribute more than five grams of cocaine base within 1,000 feet of a school in violation of 18 U.S.C. § 860(a), one count of distribution of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C), one count of distribution of cocaine base within 1,000 feet of a school in violation of 21 U.S.C. § 860(a), one count of maintenance of a premises to manufacture, distribute, store or use a controlled substance in violation of 21 U.S.C. § 856(a)(1) and one count of using or carrying a firearm "during and in relation to any . . . drug trafficking crime" in violation of 18 U.S.C. § 924(c)(1). The district court denied her motion for judgment of acquittal. *United States v. Robinson*, 779 F. Supp. 606 (D.D.C.1991). She appeals only the section 924(c)(1) conviction. The majority reverses her firearm

[1] Robinson's testimony thus is at odds with the majority's assertion that "it is unclear whether Ms. Robinson had the key to the lock on the trunk." Majority Opinion at 888.

conviction because "the possession of this single, unloaded .22-caliber derringer found in a locked trunk in a bedroom closet falls significantly short of the type of evidence we have held to establish actual use under the statute." Majority Opinion at 888. The majority concludes that "[t]he only reasonable view of the evidence in this case is that the gun was intended for use at some future date." *Id.* at 890.

To reach its conclusion, the majority relies on *Bruce* and *Derr*. In *Bruce*, the police seized a trench coat in the front closet of the apartment where the defendant lived. In the pockets of the coat, the police found ziplock bags of crack cocaine, cocaine powder and marijuana; a brown bag containing empty ziplock bags; and "a brown bag containing a belt buckle which held a fully loaded .22 caliber four-shot derringer, as well as eight rounds of .22 ammunition." *Bruce*, 939 F.2d at 1054. The defendant was convicted of possession of more than five grams of cocaine base with intent to distribute and use of a firearm in violation of section 924(c)(1).

We reversed the firearm conviction because "the evidence established only that the gun was *intended* to be used for defendant's protection at the time and place of subsequent distribution." *Id.* at 1056 (emphasis original). We reached this conclusion because

> the gun—a small derringer hidden in a belt buckle stored in a paper bag alongside drugs in the pocket of a raincoat hanging in a closet—would clearly appear to be intended for use only at the time of distribution. It is hardly the sort of weapon a drug dealer would employ for protection against an effort to penetrate a crack house.

Id. at 1055. We were able to distingiush between *present* use and *intended* use because "there was no evidence presented that any distribution of drugs took place at the apartment." Id. at 1056. In other words, because the

defendant was convicted of possession with intent to distribute and not distribution, we concluded that, while the gun might be used to protect Bruce during *future* distribution, it was not being *used* at the time of discovery to protect the drugs. "We do not see how it can be said that under such circumstances the gun is used in relation to the *possession* of the drugs, regardless of the defendant's intention to distribute the drugs subsequently." *Id.* (emphasis original).

In *Derr*, while executing a search warrant for the apartment of the defendant's friend, the police came upon a locked closet. After opening the door to the closet, the police found an unloaded, holstered .357 Magnum revolver and nine rounds of ammunition on top of a pile of miscellaneous items. Directly under the gun, the police located a plastic bag containing a padlocked wooden box. Inside the box, they found 18.4 grams of crack cocaine as well as drug paraphernalia. In other parts of the apartment, they found more drug paraphernalia. Derr, who sometimes stayed in the apartment, was charged with possession with intent to distribute and using a gun "during and in relation to his *possession* of the drugs." *Derr*, 990 F.2d at 1333 (emphasis added). The jury convicted Derr on both counts. We emphasized that a conviction under section 924(c)(1) requires "evidence showing that the firearm actually facilitated the *possession* of the drugs." *Id.* at 1337 (emphasis original). We added: *"When the predicate offense is possession,* it is also insufficient for the evidence to indicate that the gun would be used at a later time in distributing the drugs." *Id.* at 1337 (emphasis added); *see Bruce*, 939 F.2d at 1056.

The majority's reliance on *Bruce* and *Derr* stems from its totally inexplicable statement that "the *primary* drug offense underlying the conviction is possession with the intent to distribute." Majority Opinion at 887 (emphasis added). Nothing could be further from the truth. Robinson was convicted not only of *possession* with intent to

distribute; she was also convicted of *distribution* and *maintenance of a premises for the purpose of distributing drugs*, neither of which convictions she contests. Contrary to the majority's view, *Bruce*, *Derr* and every other case it cites is inapposite because not one of those cases involved distribution or maintenance convictions.[2] Robinson's uncontested convictions on the distribution and maintenance counts put her in a category wholly separate from Bruce, Derr and the other defendants whose mere possession convictions have led this court to distinguish between present and future intentions, an "exceedingly slippery slope" according to one of my colleagues. *United States v. Morris*, 977 F.2d 617, 623 (D.C.Cir.1992) (Silberman, J., concurring). Whether or not she "used" the gun in relation to her possession of crack with intent to distribute may be, if anything, *irrelevant*. The real question is whether she used the firearm "during and in relation to" her distribution and maintenance offenses.

Among the several inaccuracies contained in the majority opinion is the statement that "[t]he government, for its part, does not argue that Ms. Robinson carried, brandished or otherwise used the derringer during or in relation to the distribution of the drugs to Officer Hale."

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[2] *United States v. Derr*, 990 F.2d 1330 (D.C.Cir.1993) (possession with intent to distribute); *United States v. Morris*, 977 F.2d 617 (D.C.Cir.1992) (same); *United States v. Jefferson*, 974 F.2d 201 (D.C.Cir.1992) (same); *United States v. Williams*, 952 F.2d 418 (D.C.Cir.1991) (same), *cert. denied*, —— U.S. ——, 113 S.Ct. 148, 121 L.Ed.2d 99 (1992); *United States v. Bruce*, 939 F.2d 1053 (D.C.Cir.1991) (possession with intent to distribute and possession); *United States v. Long*, 905 F.2d 1572 (D.C.Cir.) (possession with intent to distribute), *cert. denied*, 498 U.S. 948, 111 S.Ct. 365, 112 L.Ed.2d 328 (1990); *United States v. Evans*, 888 F.2d 891 (D.C.Cir.1989) (same), *cert. denied*, 494 U.S. 1019, 110 S.Ct. 1325, 108 L.Ed.2d 500 (1990); *United States v. Anderson*, 881 F.2d 1128 (D.C.Cir.1989) (same). The majority parenthetically cites *United States v. Harris*, 959 F.2d 246 (D.C.Cir.) (per curiam) (distribution and conspiracy to distribute), *cert. denied*, —— U.S. ——, 113 S.Ct. 362, 121 L.Ed.2d 275 (1992), which upheld the section 924(c)(1) convictions.

Majority Opinion at 886-87. If the majority means by this statement that Officer Hale did not in fact see Robinson display the firearm, then I do not disagree. If, however, the majority means, as I think it does, that the government admits that there is no evidence to suggest that Robinson used, within the meaning of section 924(c)(1), the firearm when she distributed the crack to Officer Hale, I do not agree.

When a defendant challenges the sufficiency of the evidence to support his conviction, we must defer to the jury's determination and affirm if any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *United States v. Long*, 905 F.2d 1572, 1576 (D.C.Cir.), *cert. denied*, 498 U.S. 948, 111 S.Ct. 365, 112 L.Ed.2d 328 (1990). We must "view the evidence in the light most favorable to the government, allowing the government the benefit of all reasonable inferences that may be drawn from the evidence, and permitting the jury to determine the weight and the credibility of the evidence." *United States v. Sutton*, 801 F.2d 1346, 1358 (D.C.Cir.1986); *United States v. Butler*, 924 F.2d 1124, 1126 (D.C.Cir.), *cert. denied*, —— U.S. ——, 112 S.Ct. 205, 116 L.Ed.2d 164 (1991). Supporting evidence can be either direct or circumstantial. *United States v. Kegler*, 724 F.2d 190, 196 (D.C.Cir.1983); *United States v. Carter*, 522 F.2d 666, 681-82 (D.C.Cir.1975). The evidence supporting Robinson's section 924(c)(1) conviction is circumstantial which means that inferences are to be drawn from the relevant circumstances. The most significant circumstance is that the firearm was found together with the crack in Robinson's trunk in her bedroom *the night after she had distributed crack from that location*. Robinson denied she had been in the apartment the night before and the jury disbelieved her. If the jury rejected her testimony regarding her whereabouts on July 15; that rejection can, and does, inform its interpretations and conclusions with respect to the rest of her testimony. A defendant disbelieved

as to one count does not suddenly become a model of credibility with respect to the remaining counts. The jury could have reasonably inferred that Robinson had obtained the crack from her trunk when Officer Hale saw her hand her sister the crack in her bedroom; indeed, according to the evidence, the only crack found in the apartment was in the trunk. The jury could have just as reasonably concluded that the .22 caliber derringer, found with the crack and seized from the locked trunk the next night, was in the same location a short time earlier.[3]

Once the jury concluded that Robinson opened the trunk on July 15, there are only two possible conclusions: either the gun was in the trunk then or it was placed in the trunk between the evening of the 15th and the time of the search on the evening of the 16th. The jury disbelieved her testimony that she never saw drugs in the apartment; it was also free to disbelieve her testimony that she never saw the gun. Moreover, the government is "not required to disprove every conceivable scenario in which appellant would be innocent"; instead, a defendant "is entitled to a judgment of acquittal 'only when there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt.'" *United States v. Whetzel*, 589 F.2d 707, 711-12 (D.C.Cir.1978) (quoting *United States v. Davis*, 562 F.2d 681, 683 (D.C. Cir.1977)). Once the jury concluded that the gun was in the trunk with the crack at the time Robinson distributed the crack, it then had to determine whether the gun was "use[d] or carrie[d]"[4] during and in relation to the distribution.

[3] Robinson testified that she had not looked inside the locker since the evening of July 14. But that assertion flowed from her testimony that she did not go home the night of July 15, testimony the jury did not believe.

[4] Although the government does not argue on appeal that Robinson "carried" the gun during and in relation to a drug trafficking crime, the evidence indicates that during the July 15th distribution she carried the gun as well. We have held that "carry" as used in section 924(c)(1) "need not be read in a 'hypertechnical or narrow' way." *United States v. Evans*, 888 F.2d 891, 894 (D.C. Cir.1989) (citation omitted), *cert. denied*, 494 U.S. 1019, 110 S.Ct. 1325, 108 L.Ed.2d 500 (1990). A weapon need not be on a defendant's person to convict him of "carrying" a firearm. *Id.* at 895. "[A] jury could properly infer that . . . [the defendant] 'carried' the gun in the sense that it was within reach and available to protect him during his ongoing [drug trafficking offense]." *Id.*

We have held that "[m]ere possession of a gun even by a drug trafficker does not violate the statute." *United States v. Morris*, 977 F.2d 617, 621 (D.C.Cir.1992). Nonetheless, "we have construed the term as broad enough to encompass *any* case in which the gun facilitated or had a role in the trafficking offense." *Id.* (emphasis added). A defendant need not brandish or fire the gun in order to use it. *Id.; see United States v. Jefferson*, 974 F.2d 201, 205 (D.C.Cir.1992); *United States v. Evans*, 888 F.2d 891, 896 (D.C.Cir.1989), *cert. denied*, 494 U.S. 1019, 110 S.Ct. 1325, 108 L.Ed.2d 500 (1990); *United States v. Anderson*, 881 F.2d 1128, 1141 (D.C.Cir.1989).

We have further held that the only limitation on the language in section 924(c)(1) "is that the guns be used 'in relation' to the drug trafficking crime involved, which we think requires no more than that the guns *facilitate the predicate offense in some way*." *United States v. Harris*, 959 F.2d 246, 261 (D.C.Cir.) (per curiam) (emphasis added), *cert. denied*, —— U.S. ——, 113 S.Ct. 362, 121 L.Ed.2d 275 (1992). The relationship between the firearm and the predicate offense is satisfied

> "[i]f the firearm is within the possession or control of a person who commits an underlying crime as defined by the statute, and the circumstances of the case show that the firearm facilitated or had a role in the crime, such as emboldening an actor *who had the opportunity or ability* to display or discharge the weapon to protect himself or intimidate others, *whether or not such display or discharge in fact occurred*."

Id. (emphasis added) (quoting *United States v. Stewart*, 779 F.2d 538, 540 (9th Cir.1985) (Kennedy, J.), *cert. denied*, 484 U.S. 867, 108 S.Ct. 192, 98 L.Ed.2d 144 (1987)); *see also Morris*, 977 F.2d at 623 (same); *United States v. Morrow*, 977 F.2d 222, 231 (6th Cir. 1992) (en banc) (same); *United States v. Vasquez*, 909 F.2d 235, 239 (7th Cir.1990) (same), *cert. denied*, —— U.S. ——, 111 S.Ct. 2826, 115 L.Ed.2d 996 (1991).[5]

Robinson's circumstances easily satisfy the possession or control prong of the test. The jury could have reasonably concluded that she had possession or control of the gun. The police found the gun in her trunk, which she checked every day. The locker was in the closet in her bedroom in her apartment. *See Anderson*, 881 F.2d at 1141.

The gun also facilitated the distribution. The majority observes that because the gun was inside the locked trunk, it "certainly was not easily accessible" or "within 'easy reach,'" Majority Opinion at 888 (quoting *Morris*, 977 F.2d at 623), and therefore could not be used to protect Robinson or her drug stash. From its location in the trunk *next to the drugs*, however, the derringer served two purposes. First, it protected *Robinson* during distribution. While reaching to get the drugs, Robinson could easily grab the small gun without being noticed,

[5] A charge under section 924(c)(1) can be made without separately charging the underlying drug offense. *See United States v. Hill*, 971 F.2d 1461, 1463-64 (10th Cir.1992) (en banc); *United States v. Munoz-Fabela*, 896 F.2d 908, 910-11 (5th Cir.), *cert. denied*, 498 U.S. 824, 111 S.Ct. 76, 112 L.Ed.2d 49 (1990); *United States v. Hunter*, 887 F.2d 1001, 1003 (9th Cir.1989), *cert. denied*, 493 U.S. 1090, 110 S.Ct. 1159, 107 L.Ed.2d 1062 (1990). In fact, a conviction under section 924(c)(1) can stand notwithstanding acquittal on the predicate drug offense. *United States v. Laing*, 889 F.2d 281, 288-89 (D.C.Cir.1989), *cert. denied*, 494 U.S. 1069, 110 S.Ct. 1790, 108 L.Ed.2d 792 (1990); *cf. United States v. Gibbs*, 904 F.2d 52, 55 (D.C.Cir.1990).

providing her with personal protection or allowing her to intimidate others. Using the derringer in this way corresponds with its original use. *See infra* at n. 12. In *United States v. Wilson*, 938 F.2d 785 (7th Cir.1991), *cert. denied*, —— U.S. ——, 112 S.Ct. 946, 117 L.Ed.2d 115 (1992), the Seventh Circuit concluded "that a defendant intended to use the firarm in facilitation of a drug related crime 'if it [is] strategically located so as to be quickly and easily available for use during a *drug transaction.*'" *Id.* at 791 (quoting *United States v. Whitley*, 905 F.2d 163, 166 (7th Cir.1990) (quotation omitted)) (emphasis in *Wilson*). In *Wilson*, the police, after stopping the defendant, found the gun in the locked trunk of his car. Nevertheless, the Seventh Circuit upheld his conviction under section 924(c)(1) because the gun "was strategically located directly on top of the bag containing the cocaine and the defendant knew where the gun was and it was loaded and readily accessible for use if necessary should any problems arise during the drug transaction." *Id.; see also Jefferson*, 974 F.2d at 207 (finding gun was accessible in case of emergency where gun was located in grass-catcher bag next to drugs).[6]

Second, the derringer protected *the drugs* during distribution. Again, the gun's location made it easily accessible during distribution, thus providing protection *at that time*. If Robinson had "'the opportunity or ability to display or discharge,'" *Harris*, 959 F.2d at 261 (quot-

[6] That the gun here may have been unloaded (there was no affirmative evidence one way or the other) and that no ammunition was present are matters of little importance. Many courts have found that an unloaded gun can violate section 924(c). *See, e.g., United States v. Gutierrez-Silva*, 983 F.2d 123, 125 (8th Cir. 1993) (quickly accessible firearm in close proximity to drugs violated section 924(c) even though gun was unloaded and no ammunition was found); *United States v. Hill*, 967 F.2d 902, 905-07 (3d Cir.1992) (easily accessible rifle located next to drugs violated section 924(c) even though gun was unloaded, no ammunition was present and rifle stock was separated from barrel).

ing *Stewart*, 779 F.2d at 540), the gun at the time of distribution, which the jury could have reasonably concluded based on its proximity to the drugs, the jury could have likewise reasonably concluded that the gun " 'facilitated . . . the crime' " by protecting her or the drugs, thereby " 'emboldening' " her to commit the crime. *Id.* (quoting *Stewart*, 779 F.2d at 540).[7]

Moreover, even if her distribution conviction did not support Robinson's section 924(c)(1) conviction, her conviction based on 21 U.S.C. § 856(a)(1) does. The jury found, and Robinson does not contest, that she violated 21 U.S.C. § 856(a)(1) by maintaining a premises to manufacture, distribute, store or use a controlled substance. Although the majority goes to great lengths in its attempt to show that Robinson's apartment was not really a "crack house," its discussion is irrelevant. Whether or not Robinson's apartment fits the usual description of a crack house, the jury found that she maintained her apartment in violation of section 856(a)(1) and she does not challenge that finding.

Maintenance of a premises for the purpose of distributing drugs is not a "passive," *Bruce*, 939 F.2d at 1055,

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[7] In *United States v. Feliz-Cordero*, 859 F.2d 250, 254 (2d Cir. 1988), a case cited with approval in *Bruce*, 939 F.2d at 1055, and in *Long*, 905 F.2d at 1578, the Second Circuit stated that "use" in relation to distribution is satisfied by:

> i) Proof of a transaction in which the circumstances surrounding the presence of a firearm suggest that the possessor of the firearm intended to have it available for possible use during the transaction; or ii) The circumstances surrounding the presence of a firearm in a place where drug transactions take place suggest that it was strategically located so as to be quickly and easily available for use during such a transaction.

Robinson's circumstances satisfy both tests delineated in *Feliz-Cordero*, that is, her distribution conviction fits the first circumstance and her section 856(a)(1) conviction fits the second.

crime like possession. We noted in *United States v. Lancaster*, 968 F.2d 1250, 1253 (D.C.Cir.1992), that

> [s]ection 856(a)(1) makes it unlawful only to "open or maintain any place *for the purpose of* manufacturing, distributing, or using any controlled substance." The "casual" drug user does not run afoul of this prohibition because he does not maintain his house for the purpose of using drugs but rather for the purpose of residence, the consumption of drugs therein being merely incidental to that purpose.

(emphasis added in *Lancaster*). Because it is an ongoing offense,[8] the jury could permissibly conclude that a gun found on the premises was being used "during and in relation to" that offense. And the majority's chief authority, *Bruce*, expressly recognizes this difference:

> If guns are strewn around a "crack house" in which drugs are stored, it might be inferred that the guns are there to protect the occupant's "possession." In such a case, the guns are "used" in relation to the drug trafficking crime of possession with intent to distribute because they are intended to protect the stash of drugs that will subsequently be distributed. And although the actual distribution is a separate crime, courts have treated evidence of use of guns in such a house for protection of the distribution function as equivalent to protection of possession. Since in the typical crack house possession and distribution are intertwined, that seems to us to be a logical interpretation of the statute.

Bruce, 939 F.2d at 1055 (citations omitted).[9] In other words, Robinson used the gun to facilitate ongoing drug

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[8] Indeed, we *know* that at least two instances of crack distribution occurred in Robinson's apartment within a twenty-four hour period.

[9] The only difference between the premises described in *Bruce* and Robinson's apartment is the absence in the latter of "guns

trafficking crimes (actual distribution on the premises and maintenance of a premises for the purpose of distributing drugs) and therefore violated section 924(c)(1).[10]

The majority attaches significance to the presence of only one gun to conclude that Robinson did not use the derringer to protect herself or the drugs. We have considered the number of guns present to be a factor in determining usage, *see Morris*, 977 F.2d at 622, and have distinguished between an "arsenal" of guns to protect distribution sites and a single gun. *See United States v. Williams*, 952 F.2d 418, 421 (D.C.Cir.1991). *Compare United States v. Anderson*, 881 F.2d 1128 (D.C.Cir. 1989) *with United States v. Bruce*, 939 F.2d 1053 (D.C. Cir.1991). At the same time, however, we have made

strewn around." *Bruce*, 939 F.2d at 1055. The danger, if not error, in distinguishing between one gun and more than one gun in an analysis of section 924(c)(1) is discussed *infra*.

[10] The Supreme Court's most recent decision interpreting section 924(c)(1) supports affirming Robinson's conviction. In *Smith v. United States*, —— U.S. ——, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993), the Court, citing, *inter alia*, *United States v. Harris*, *supra*, declared:

> The phrase "in relation to" is expansive, as the courts of appeals construing § 924(c)(1) have recognized. Nonetheless, the phrase does illuminate § 924(c)(1)'s boundaries. According to Webster's, "in relation to" means "with reference to" or "as regards." The phrase "in relation to" thus, at a minimum, clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence. As one court has observed, the "in relation to" language "allays explicitly the concern that a person could be" punished under § 924(c)(1) for committing a drug trafficking offense "while in possession of a firearm" even though the firearm's presence is coincidental or entirely "unrelated" to the crime. Instead, the gun at least must "*facilitate, or have the potential of facilitating*," the drug trafficking offense.

Id., —— U.S. at ——-——, 113 S.Ct. at 2058-59 (citations omitted) (emphasis added).

clear that the use of only one gun violates section 924(c)(1). *See Morris*, 977 F.2d at 622. Section 924(c)(1) requires the use of "a" firearm, not multiple firearms. *See United States v. Freisinger*, 937 F.2d 383, 390 (8th Cir.1991) ("A statute which prefaces the object of the offense with the word 'a' unambiguously authorizes singular units of prosecution.").

On the rare occasion that we have found the use of one gun violative of the statute, the firearm was large and powerful. *See Jefferson*, 974 F.2d at 208 ("a 12-gauge shotgun is a formidable firearm"). But section 924(c)(1) does not require that a gun be of a certain caliber or size to come within the statute.[11] Nor does the use of the firearm have to be successful. A drug defendant's choice of a less effective firearm does not affect his use of it. The reason any firearm no matter its size or firepower violates section 924(c)(1) when used during and in relation to a drug trafficking crime is obvious: Any gun can kill or wound. *See Blank Pistol Kills Actor, The Son of Bruce Lee*, N.Y. Times, April 1, 1993, at A14.

By creating a hierarchy of guns, we encourage a defendant to argue about the characteristics of his firearm in order to establish that it does not come within section 924(c)(1)'s proscription. Indeed, Robinson's counsel asserted at oral argument:

[11] Section 924(c)(1) does differentiate among firearms in providing for punishment. For example, use of a short-barreled rifle or shotgun increases the punishment from five years' to ten years' imprisonment. If the firearm is "a machine gun, or destructive device, or is equipped with a firearm silencer or firearm muffler," the punishment is thirty years. If the conviction is the defendant's second or subsequent conviction under section 924(c)(1), the punishment increases to twenty years for a firearm other than a machine gun or a firearm that is a destructive device or equipped with a silencer, or muffler. For the latter category, a second conviction results in life imprisonment without release.

> COUNSEL: [The derringer] is basically a joke of a weapon. . . .
>
> THE COURT: Well, now wait a minute. It's not a joke of a weapon, it can kill people—
>
> COUNSEL: Well, it can, if you get lucky—

Disparagement of the derringer ignores reality.[12] Some of my colleagues have referred to the gun as "lowly," *Jefferson*, 974 F.2d at 209, and "ornamental," *Morris*, 977 F.2d at 622. Perhaps they have forgotten it was a derringer that took the life of Abraham Lincoln. *See* George C. Nonte, Jr. Pistol & Revolver Guide 16 (1975).

I have no difficulty concluding that Robinson used the derringer in violation of section 924(c)(1). Accordingly, I dissent.

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[12] The history of the derringer began in the mid 1800s, the age of the riverboat gambler. As one author noted, "[t]he Derringer in the late 19th century was known as the 'gambler's gun,' because it could be hidden up a man's sleeve and flipped into his hand in an instant." Robert Hertzberg, The Modern Handgun 68 (1965). It became popular because it was easy to conceal and was effective in emergency situations. One author described it as

> truly the gun for the ladies' hand bag. It is very small, as was the original Remington from which it was redesigned. It is also an excellent under cover gun for the peace officer or soldier for emergency use, or for anyone for a close range defense gun. The small cartridge is not the best for serious work but is far better than no gun at all and is quite effective at close range where such a gun would be used.

Elmer Keith, Sixguns by Keith 83-84 (1955).

The modern derringer is likewise an effective weapon. The government's expert witness testified that "[t]he first weapon of choice among dealers is a .357 or .44 magnum, or something more powerful than this, but it's still as effective as that .357 or .44 magnum."

Before: MIKVA, Chief Judge; WALD, HARRY T. EDWARDS, SILBERMAN, BUCKLEY, STEPHEN F. WILLIAMS, D.H. GINSBURG, SENTELLE, KAREN LECRAFT HENDERSON, and RANDOLPH, Circuit Judges.

ORDER

Oct. 8, 1993

Appellee's Suggestion For Rehearing *En Banc* and the response thereto have been circulated to the full Court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service voted in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is granted and this case will be reheard by the Court sitting *en banc*.

It is FURTHER ORDERED, by the Court *en banc*, that the judgment of the court filed herein on June 18, 1993, is hereby vacated.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 90-3119, 92-3062

UNITED STATES OF AMERICA

v.

ROLAND J. BAILEY,
Appellant.

UNITED STATES OF AMERICA

v.

CANDISHA SUMMERITA ROBINSON a/k/a
CANDYSHA ROBINSON,
Appellant.

Appeal from the United States District Court
for the District of Columbia
(CR-89-00310-01, CR-91-00453-01)

Argued In Banc March 30, 1994

Decided Oct. 4, 1994

Before EDWARDS, Chief Judge, WALD, MIKVA,* SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG,

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* Then-*Chief Judge* MIKVA, a member of the Court when these cases were argued *in banc*, took no part in the disposition.

SENTELLE, HENDERSON, and RANDOLPH, Circuit Judges.

Opinion for the Court filed by Circuit Judge GINSBURG.

Dissenting opinion filed by Circuit Judge WALD.

Dissenting opinion filed by Circuit Judge STEPHEN F. WILLIAMS, in which Circuit Judges SILBERMAN and BUCKLEY concur.

Separate dissenting statement filed by Circuit Judge SILBERMAN.

GINSBURG, Circuit Judge:

This consolidated case involves two separate challenges, one by appellant Roland Bailey and one by appellant Candisha Robinson, to their convictions under 18 U.S.C. § 924(c)(1). In relevant part, that section imposes a five-year term of imprisonment upon anyone who "during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm." We have long required that in order to support a conviction under § 924(c)(1), the government must demonstrate both a "nexus . . . between a particular drug offender and the firearm." *United States v. Long*, 905 F.2d 1572, 1577 (D.C.Cir.1990), and that "the gun facilitate[d] the predicate offense in some way," *United States v. Jefferson*, 974 F.2d 201, 205 (D.C.Cir.1992). In order to assess whether the government has made the required showing, we have developed an open-ended test that takes account of numerous factors arguably relevant to whether a gun was used in relation to a drug trafficking offense. *See, e.g., United States v. Derr*, 990 F.2d 1330, 1338 (D.C. Cir.1993); *United States v. Morris*, 977 F.2d 617, 621-22 (D.C.Cir.1992). Applying this test, divided panels of the court affirmed Bailey's conviction, *see United States v. Bailey*, 995 F.2d 1113 (D.C.Cir.1993), and reversed Robinson's conviction, *see United States v. Robinson*, 997 F.2d 884 (D.C.Cir.1993).

Because this complex, open-ended test has produced widely divergent results and because we believe that it intrudes the court into the province of the jury we now replace it with a test that looks to two factors only: the proximity of the gun to the drugs involved in the underlying offense, and the accessibility of the gun to the defendant from the place where the drugs, drug paraphernalia, or drug proceeds are located. Applying that test, we affirm both convictions.

I. Background

In each of these cases, possession with the intent to distribute cocaine was the predicate drug offense in connection with which the defendant was charged with using or carrying a firearm in violation of § 924(c)(1). The facts of each case are briefly as follows.

A. United States v. Bailey

In May 1989, Roland Bailey was stopped by two Metropolitan Police officers after they noticed that the car he was driving had no front license plate and no inspection sticker. When Bailey failed to produce a driver's license, the officers ordered him out of the car. Before Bailey exited the car, the officers saw him push something between the seat and the front console. Upon searching the passenger compartment of the car they discovered one round of ammunition and 27 small plastic bags containing a total of 30 grams of cocaine. The officers then placed Bailey under arrest; the ensuing search of the trunk of his car turned up a loaded 9-mm. pistol and $3,216 in cash.

Bailey was charged with one drug offense and one other firearms offense in addition to using or carrying a firearm in violation of 18 U.S.C. § 924(c)(1). At trial, Detective Charles DiDomenico, a narcotics expert, testified that weapons such as Bailey's are frequently carried by drug dealers "not only to protect themselves, but [also]

to protect their assets, drugs and money." Bailey was convicted by the jury on all charges and was sentenced by the court to two consecutive 51-month sentences of imprisonment on the drug and weapon charges not at issue here, and to a consecutive 60-month term of imprisonment on the § 924(c)(1) conviction.

B. United States v. Robinson

In June 1991, an undercover officer of the Metropolitan Police Department approached Veloria Robinson, the sister of appellant Candisha Robinson, and told her that he wanted to buy crack cocaine. Veloria then took him to an apartment in the northeast quadrant of the city. Candisha opened the door; Veloria told her that the officer wanted something. When Candisha asked what he wanted, he replied that he wanted a "twenty." He then entered the apartment and the Robinson sisters went into the bedroom. He saw Candisha hand Veloria a rock of crack cocaine, which Veloria then sold to him. The next evening, the officer made another controlled buy at the same apartment, this time from a man who claimed that he also lived there.

Shortly after the second controlled buy, a search warrant was executed at the apartment. Inside a locked trunk in the bedroom closet the police found a .22-caliber Derringer, appellant Robinson's 1990 tax return, a letter from her employer, 10.88 grams of crack cocaine, and the marked $20 bill from the first controlled buy. They also found a quantity of plastic baggies in the bedroom.

At trial, Detective David Stroud, a narcotics expert, testified that the Derringer was a "second gun"—that is, a type of gun that a drug dealer might hide on his person for use until he could get to his "real gun." Stroud also testified that drug dealers generally use guns to protect themselves from other drug dealers, the police, and their own employees.

Robinson was convicted by a jury on five separate drug counts as well as on the § 924(c)(1) charge. Including the 60-month term of imprisonment for violating § 924(c)(1), she was sentenced to 157 months of imprisonment, four years of supervised release, and a special assessment of $300.

C. *The Appeals in Bailey and Robinson*

Each defendant appealed his or her § 924(c)(1) conviction on the ground that the Government had failed to adduce sufficient evidence at trial that he or she had "used" or "carried" a firearm in relation to a drug offense. Different panels affirmed Bailey's conviction and reversed Robinson's, in each case over a dissent. Bailey and the government respectively suggested rehearing *in banc*. In order to resolve the apparent inconsistencies in our various decisions applying to § 924(c), we consolidated the two cases and reheard them *in banc*.

II. Analysis

Section 924(c)(1) states that:

> Whoever, during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment for such . . . drug trafficking crime, be sentenced to imprisonment for five years.

By requiring that the use of the firearm be "in relation to" a drug trafficking offense, the Congress made it clear that it did not intend to criminalize the mere possession of a firearm by someone who commits a drug offense. "[T]he firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." *Smith v. United States*, —— U.S. ——, ——-——, 113 S.Ct. 2050, 2058-59, 124 L.Ed.2d 138 (1993). At the same time, it is clear that a firearm need not actually be brandished in order to be used or carried in

connection with a drug trafficking offense. *United States v. Evans*, 888 F.2d 891, 896 (D.C.Cir.1989). As Justice (then Judge) Kennedy wrote for the Ninth Circuit in the seminal opinion on § 924(c)(1):

> If the firearm is within the possession or control of a person who commits an underlying crime as defined by the statute, and the circumstances of the case show that the firearm facilitated or had a role in the crime, such as emboldening an actor who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others, whether or not such display or discharge occurred, then there is a violation of [the statute].

United States v. Stewart, 779 F.2d 538, 540 (9th Cir. 1985) (internal citations omitted).

A. *Section 924(c)(1) to Date*

In an effort to distinguish between mere possession of and the use or carrying of a gun in connection with a drug trafficking crime, we held early on that more than just evidence of proximity was required to establish "that the gun supported the possession crime." *United States v. Bruce*, 939 F.2d 1053, 1055 (D.C.Cir.1991). By the next year, we were able to state that "a number of factors" may be relevant in any particular case: "courts have identified and will [continue to] identify" such factors. *United States v. Morris*, 977 F.2d 617, 621 (D.C. Cir.1992). Just two years later Judge Wald summarized the development of our case law this way:

> [W]e have enumerated a nonexclusive set of factors to weigh in making that [distinction]. Among other things, we look to whether a gun is accessible to the defendant, whether it is located in proximity to the drugs (which may cut either way depending on the facts of a particular case), whether it is loaded, what type of weapon it is, and, finally, whether there is

expert testimony to bolster the government's particular theory of "use."

Derr, 990 F.2d at 1338 (citing *Morris*, 977 F.2d at 621-22). Thus, in each case in which a defendant challenges the sufficiency of the evidence for his conviction under § 924(c)(1), we have weighed each bit of evidence against him in order to determine whether the defendant could be said to have used (or carried) his gun in furtherance of his drug crime.

Defendants Bailey and Robinson do not attack this open-ended (for convenience *Bruce-Morris-Derr*) approach in determining whether a gun was used during and in relation to a drug trafficking offense. Nor do they question the prior holding of this (and other) court(s) that a gun need not be brandished or displayed in order to be used or carried. Instead, each argues that if this approach were properly applied, he or she could not have been convicted based upon the evidence presented at trial. In response, the government argues that it needs to present evidence only that the defendant possessed a firearm and that the firearm in some way facilitated the drug crime; thus implicitly the Government asks us to abandon the *Bruce-Morris-Derr* approach in favor of a simpler test.

In form the dispute between the parties is little more than a disagreement over the evidence necessary to obtain a § 924(c)(1) conviction; neither side expressly addresses the question of how the disputed element of the crime, *viz.* "use," ought to be defined. In substance, however, this case is about what constitutes use, as opposed to mere possession, of a firearm. Only when we have resolved that question can we determine the quantum of evidence necessary to convict and formulate an appropriate test for assessing whether the government has produced that evidence.

We granted rehearing in order to revisit these issues in the light of our experience using the *Bruce-Morris-Derr*

approach. We do so bearing in mind that because the *Bruce-Morris-Derr* approach represents the established law of the circuit, a due regard for the value of stability in the law requires that we have good and sufficient reason to reject it at this late date. *See McKinney v. Pate*, 20 F.3d 1550, 1565 n. 21 (11th Cir.1994) (*in banc*) (noting that although "the implications of *stare decisis* are less weighty" when an *in banc* court reviews an issue for the first time, "*stare decisis* is a hallmark of our judicial system" and should still be considered by the court *in banc*). In particular, we reconsider our own prior construction of a statute somewhat gingerly as well because " 'unlike in the context of constitutional interpretation . . . Congress remains free to alter what we have done.' " *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 875 (D.C.Cir.1992) (*in banc*) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73, 109 S.Ct. 2363, 2370, 105 L.Ed.2d 132 (1989) (internal citations omitted)); *see also Cottrell v. Commissioner*, 628 F.2d 1127, 1131 (8th Cir.1980) (*in banc*) "The doctrine of *stare decisis*, weighty in any context, is especially so in matters of statutory construction.").

We have nonetheless identified at least three factors that justify rejecting established precedent. First, the *in banc* court may properly overrule a prior panel decision if "it decides that the panel's holding on an important question of law was fundamentally flawed." *Critical Mass Energy Project*, 975 F.2d at 876. In this regard, we conclude below that the open-ended *Bruce-Morris-Derr* approach impermissibly intrudes into the province of the jury. Second, when "a precedent [is] a positive detriment to coherence and consistency in the law . . . because of inherent confusion created by an unworkable decision," the court is justified in overruling that precedent. *Patterson*, 491 U.S. at 173, 109 S.Ct. at 2371. In this case, even a brief survey of our decisions demonstrates (below) that the *Bruce-Morris-Derr* approach has produced

and will likely continue to produce inconsistent results. Finally, the *in banc* court may overrule a prior precedent interpreting a statute "if it finds that other circuits have persuasively argued a contrary construction." *Critical Mass Energy Project*, 975 F.2d at 876. Again, a survey of the other circuits (also below) demonstrates that they have uniformly adopted a standard different from ours and one that seems more conducive to consistent application.

Preliminarily, therefore, we survey the problems inherent in the *Bruce-Morris-Derr* approach: intrusion into the province of the factfinder, seemingly inconsistent results, and a continuing conflict with the interpretation of § 924(c)(1) adopted by virtually every other circuit.

1. The Province of the Jury

It is a cardinal principle of our system of criminal law that the facts are settled by the trier of fact, be it a jury or a judge, and are not ordinarily to be redetermined by a reviewing court. On appeal from a general verdict finding a defendant guilty, the deference we owe to the trier of fact requires that we draw from the record all inferences that can justifiably be drawn in support of the conviction. Hence, in assessing the sufficiency of the evidence, as an appellate court we must ask not "whether [we] believe[] that the evidence at the trial established guilt beyond a reasonable doubt, but whether the judgment was supported by substantial evidence." *Woodby v. Immigration & Naturalization Service*, 385 U.S. 276, 282, 87 S.Ct. 483, 486, 17 L.Ed.2d 362 (1966). Or, as the Supreme Court said in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979), "the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319, 99 S.Ct. at 2789 (emphasis in original); *see also United States v. Long*, 905 F.2d 1572, 1576 (D.C.Cir.1990)

("A jury is entitled to draw a vast range of reasonable inferences from evidence, but may not base a verdict on mere speculation").

Whether a gun was used during and in relation to a drug trafficking offense is, at its core, a question of fact. In a case where the gun was not actually fired or brandished during the commission of the crime, it may well be an ultimate rather than a basic fact, but it is still a question of fact and not of law. Of course, an appellate court may properly determine, as a matter of law, the baseline or minimum conduct that can constitute a "use," and it must determine in each case, with appropriate deference to the jury, whether the record contains sufficient evidence of such conduct. The reviewing court does not sit, however, to make its own finding with respect to an ultimate fact. Weighing the evidence is a function assigned to the jury: "We are not a second jury weighing the evidence anew and deciding whether or not we would vote to convict the defendant." *United States v. Poston*, 902 F.2d 90, 94 (D.C.Cir.1990). Yet the use of an approach that requires the court to weigh numerous factors and to determine the specific relevance of individual facts in order to assess the sufficiency of the evidence invites the court to do just that.

The *Bruce-Morris-Derr* approach strips from the jury its "responsibility [as] the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 307 U.S. at 319, 99 S.Ct. at 2789. For example, in *United States v. Bruce*, 939 F.2d 1053 (D.C. Cir.1991), we were at considerable pains to determine whether a small gun found in the pocket of a coat along with a stash of drugs "was intended for use only at the time of distribution" or was rather "the sort of weapon a drug dealer would employ for protection against an effort to penetrate a crack house." *Id.* at 1055. Determining that the former was more likely true, we reversed the con-

viction. *See id.* at 1056. Similarly, in *Derr* and *Robinson*, the panel struggled to determine for itself the significance of the fact that the defendant's gun was locked respectively in a closet or trunk with a stash of drugs at the time of the defendant's arrest. *See Robinson*, 997 F.2d at 888; *Derr*, 990 F.2d at 1338. Determining the weight to be given a single piece of evidence is not ordinarily an appropriate function for an appellate court.

A due regard for the limits that the jury system necessarily places upon the scope of our review would not lead us to abdicate all our responsibility as an appellate court —for example by affirming any conviction in which a gun is found and there is some connection, no matter how speculative or remote, between the gun and the predicate drug offense. A jury may convict a defendant for any of a number of impermissible reasons, and therefore, if the defendant claims that the evidence against him is insufficient to sustain his conviction, we must as an appellate court review the record conscientiously. *See United States v. Zeigler*, 994 F.2d 845, 849 (D.C.Cir. 1993). Nor does our recognition that the approach heretofore used in this circuit impinges upon the province of the jury by itself predetermine precisely how we ought to review a § 924(c)(1) case. It does, however, strongly suggest that we must replace the open-ended *Bruce-Morris-Derr* approach with a manageable standard; we must, that is, state clearly the minimum showing that the government must make in order to put to the jury the question whether a defendant has violated § 924(c)(1).

2. Inconsistent Results

The open-ended approach described in *Derr* has produced widely divergent and seemingly contradictory results. Panels have upheld convictions where a loaded, sawed-off shotgun was found along with crack cocaine and drug paraphernalia in a lawn clipping bag beneath the exterior stairwell of a house and additional drugs and paraphernalia were found in the defendant's bedroom,

see United States v. Jefferson, 974 F.2d 201 (D.C.Cir. 1992); where loaded pistols were found underneath a sofa cushion and on a bedroom nightstand in the defendant's house, which elsewhere contained crack cocaine in ziplock bags and other drug paraphernalia, *see United States v. Morris*, 977 F.2d 617 (D.C.Cir.1992); and where a loaded 9-mm. pistol was found along with cash in the trunk of the defendant's car after bags of cocaine had been found in the front seat of the car, *see United States v. Bailey*, 995 F.2d 1113 (D.C.Cir.1993). In contrast, panels have reversed convictions where a loaded .22 caliber Derringer was found, along with individual packages of cocaine and marijuana, in a pocket of the defendant's trench coat in the house in which he lived, *see United States v. Bruce*, 939 F.2d 1053 (D.C.Cir. 1991); where an unloaded .357 Magnum revolver was found along with the defendant's birth certificate and a locked box containing cash, crack cocaine, and drug paraphernalia in an apartment in which the defendant was staying, *see United States v. Derr*, 990 F.2d 1330 (D.C.Cir.1993); and where an unloaded .22 caliber Derringer was found in a closet along with crack cocaine and drug proceeds, including marked money, *see United States v. Robinson*, 997 F.2d 884 (D.C.Cir.1993). Although each of these cases can be distinguished on the basis of one or another fact—for example, by looking to the type of gun involved or to how easily the defendant could have grabbed the gun at the time that he was arrested—such distinctions seem counter-intuitive if not arbitrary. Having reflected upon our experience, we think it apparent that the court has failed to take a consistent approach because it has not laid down a standard that yields determinate results in any but the easiest of cases.

3. Conflict with Other Circuits

No other circuit has found our open-ended approach persuasive. Our sister circuits have each adopted a definition of "use" that is considerably broader than firing,

displaying, or otherwise brandishing the firearm. They focus upon whether the evidence concerning the location of the gun is sufficient to permit the jury to conclude that the gun in some way facilitated the predicate drug trafficking offense. From a functional perspective, the standards they have developed for assessing the sufficiency of the evidence are much more similar to the "proximity and accessibility" standard we adopt today than to the open-ended approach that we have used in the past.

The opinion in *United States v. Molinar-Apodaca,* 889 F.2d 1417 (5th Cir.1989) is representative. In that case, police officers executing a search warrant had found a commercial quantity of marijuana in a shed outside the defendant's house; in the house itself, they found an automatic rifle and a semi-automatic shotgun. *Id.* at 1422. In analyzing the defendant's challenge to the sufficiency of this evidence, the Fifth Circuit did not look at such details as whether the guns were loaded or whether they were the appropriate type of weapon to protect an ongoing drug operation. Rather, applying circuit law to the effect "that the government is only obliged to show that the firearm was available to provide protection to the defendant in connection with his engagement in drug trafficking," the court affirmed the conviction.

In the wake of Justice Kennedy's analysis in *Stewart,* the Ninth Circuit applies an equally straightforward test. That court will affirm a conviction under § 924(c)(1) "if [the firearm's] physical proximity to the defendant at any time during the commission of the crime, or during arrest, supports the inference that it emboldened him to commit the underlying offense or to resist arrest." *United States v. Torres-Medina,* 935 F.2d 1047, 1050 (9th Cir.1991).

Every other circuit similarly focuses, in essence, upon whether the firearm was accessible and proximate to the defendant during the commission of the drug offense. In numerical order by circuit, *see, e.g., United States v.*

Paulino, 13 F.2d 20, 26 (1st Cir.1994) ("[T]he court's critical concern should . . . be whether . . . [the firearm] was 'available for use' in connection with the narcotics trade"); *United States v. Medina,* 944 F.2d 60, 66 (2d Cir.1991) (holding that a conviction may be affirmed "where circumstances indicate that the defendant intended to use the weapon by strategically placing it so that it could be available for use during a drug transaction"); *United States v. Hill,* 967 F.2d 902, 906-07 (3d Cir. 1992) (holding that where the proximity of the gun to the drugs indicated that the defendant's "access to the weapon was unimpeded by distance or other objects," the jury could conclude that the weapon "facilitated [the defendant's] possession of and intention to distribute" illegal drugs); *United States v. Paz,* 927 F.2d 176, 179 (4th Cir.1991) (affirming a conviction because, during the course of defendant's possessory offenses, "the gun was present and accessible, even though under a mattress"); *United States v. Thomas,* 12 F.3d 1350, 1362 (5th Cir.1994) ("The presence of firearms at the home of a defendant where drugs, money, and ammunition are also found . . . is sufficient to establish the 'use' of a firearm as an integral part of a drug-trafficking crime in violation of § 924(c)(1)"); *United States v. Warner,* 10 F.3d 1236, 1239 (6th Cir.1993) (affirming a conviction solely because the firearm was "readily accessible for drug-related protection"); *United States v. Vasquez,* 909 F.2d 235, 240 (7th Cir.1990) (holding that a conviction under § 924(c)(1) is appropriate when guns and drugs are present in the same location, because the "trier of fact [can] reasonably conclude that the availability of firearms instills [in the defendant] a heightened sense of security [while] he posses[es] the drugs with the intent to distribute them"); *United States v. Quintanilla,* 25 F.3d 694, 700 (8th Cir.1994) ("To support a conviction under section 924(c)(1), the government need only establish that a firearm was present and available for use"); *United States v. Torres-Medina,* 935 F.2d 1047,

1050 (9th Cir.1991) ("We hold that a firearm may be considered available [and therefore used by a defendant] for purposes of section 924(c)(1) if its physical proximity to the defendant at any time during the commission of the crime, or during arrest, supports the inference that it emboldened him to commit the underlying offense or to resist arrest"); *United States v. McKinnell,* 888 F.2d 669, 675 (10th Cir.1989) (holding that "the uses element of section 924(c)(1) is satisfied when the defendant has ready access to the firearm and the firearm was an integral part of his criminal undertaking and its availability increased the likelihood that the criminal undertaking would succeed" (internal quotation marks omitted)); *United States v. Poole,* 878 F.2d 1389, 1393 (11th Cir.1989) ("[P]ossession of a firearm constitutes use in relation to the drug trafficking offense if the possession is an integral part of, and facilitates the commission of, the drug trafficking offense"); *see also* Note, *Smith v. United States and the Modern Interpretation of 18 U.S.C. 924(c)(1): A Proposal to Amend the Federal Armed Offender Statute,* 69 NOTRE DAME L.REV. 815, 843 & nn. 187-190 (1994) (noting that "other circuits have specifically rejected many of the factors considered by the D.C.Circuit: size of the gun . . . whether the firearm was loaded, number of weapons, and evidence of past actual use"). *But cf. United States v. Taylor,* 18 F.2d 55, 58 (2d Cir.1994) (noting that the analysis of a sufficiency challenge "is clearly a very fact-intensive question [that] requir[es] a careful examination of, among other things, where the gun was located and what else was found in the apartment").

B. Section 924(c) Henceforth

As the Supreme Court has made clear, the government must make two distinct showings in order to obtain a conviction under § 924(c)(1): "that the defendant 'use[d] or carrie[d] a firearm' " and "that the use or carrying was 'during and in relation to' " a predicate offense.

Smith v. United States, —— U.S. ——, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993). Therefore, in determining what the proper standard should be, we must determine both what constitutes the use or carrying of a gun and in what circumstances such a use or carrying is in relation to a drug trafficking offense.

1. "Use" of a Firearm

In the context of § 924(c)(1), "use" could be defined either narrowly, so as to encompass only the paradigmatic uses of a gun, i.e., firing, brandishing, or displaying the gun during the commission of the predicate offense, or more broadly, so as to include the other ways in which a gun can be used to facilitate drug trafficking. The narrow definition has the virtue of simplicity; it is, after all, relatively easy to determine whether the defendant's firing, brandishing, or displaying a gun was related to the defendant's contemporaneous (recall the "during" requirement of § 924(c)(1)) drug trafficking offense. The narrow definition also has the vice of simplicity, however; it is too narrow to capture all of the various uses of a firearm that the Congress apparently intended to reach via § 924(c)(1).

Certainly nothing in the statute indicates that tne Congress intended to exclude any use from the scope of its prohibition. Indeed, the Supreme Court has said that in § 924(c)(1), the "Congress employed the term 'use' expansively." *See Smith,* —— U.S. at ——, 113 S.Ct. at 2058. Wherefore, it held that the statute prohibits the "use" of a firearm even as an object that can be bartered for drugs. *See Smith,* —— U.S. at ——, ——, 113 S.Ct. at 2055, 2057.

Like firing, brandishing, or displaying a gun, barter involves handling the gun. A gun can surely be used even when it is not being handled, however. For example, a gun placed in a drawer beside one's bed for fear

of an intruder would, in common parlance, be a gun "used" for domestic protection.

This more inclusive understanding of "use" has long been recognized in the jurisprudence of the Supreme Court. In *Astor v. Merritt,* 111 U.S. 202, 4 S.Ct. 413, 28 L.Ed. 401 (1884), the Court was required to interpret a customs statute that exempted from duty "[w]earing apparel in actual use . . . of persons arriving in the United States." *Id.* at 203, 4 S.Ct. at 413. The petitioner sought an exemption for clothing that he and his family had purchased abroad, but not yet worn. The Court accepted his argument:

> If a person residing in the United States should purchase wearing apparel here, in a condition ready for immediate wear without further manufacture, intended for his own use or wear, suitable for the immediately approaching season of the year, and not exceeding in quantity, quality or value the limit above mentioned, no one would hesitate to say that such wearing apparel was 'in actual use' by such person, even though some of it might not have been actually put on or applied to its proper personal use. . . . An article of wearing apparel, bought for use, and appropriated and set apart to be used, by being placed in with, and as a part of, what is called a person's wardrobe, is, in common parlance, in use, in actual use, in present use, in real use, as well before it is worn as while it is being worn or afterwards.

Id. at 213, 4 S.Ct. at 419. Likewise, in *Smith,* the Court noted with approval the following definition of the verb "to use": " '[t]o make use of; to convert to one's service; to avail oneself of; to utilize; to carry out a purpose or action by means of.' " *Id.* —— U.S. at ——, 113 S.Ct. at 2054 (quoting BLACK'S LAW DICTIONARY 1541 (6th ed. 1990)).

In the context of § 924(c)(1), therefore, we hold that one uses a gun, i.e., avails oneself of a gun, and therefore violates the statute, whenever one puts or keeps the gun in a particular place from which one (or one's agent) can gain access to it if and when needed to facilitate a drug crime. In a case where the predicate offense involves the distribution of drugs, the government must show that the defendant had the gun in such a place at the time that the drugs were being distributed. In a case when the predicate offense is possession with the intent to distribute drugs, however, the government need not prove that the gun was in that place during the entire period that the defendant illegally possessed the drugs or that it was in that place at the time that the defendant was arrested. Because possession with the intent to distribute is a continuing offense—that is, an offense that extends through time—the government need only prove that the defendant put or kept the gun in that place at some point while the defendant illegally possessed the drugs.[1]

2. "During" and "In Relation To"

Once it is determined that the defendant has used or carried a gun, the more difficult question is whether he has done so "in relation to a drug trafficking offense."

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[1] Invoking *United States v. Ray,* 21 F.3d 1134 (D.C.Cir.1994), and the Solicitor General's brief in *McLaughlin v. United States,* 476 U.S. 16, 106 S.Ct. 1677, 90 L.Ed.2d 15 (1986), the dissent proposes that one may "use" a firearm in connection with a drug trafficking offense only by displaying it or, if the weapon is concealed, by threatening to use it. Judge Williams' Dissenting Opinion pp. 123-25. This ignores that how one "uses" a weapon in a crime necessarily depends upon the nature of the crime. *Ray* and *McLaughlin* were aggravated bank robbery cases, interpreting 18 U.S.C. § 2113(d). Of course one must somehow threaten another with a dangerous weapon in order to commit that offense. But it is senseless to say the same of crimes involving possession of drugs. Those are furtive crimes. Stealth is essential to their success. If, as expected, the drugs are secreted, one should expect the firearms to be as well.

As the Court noted in *Smith*, this requirement "at a minimum, means that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." —— U.S. at ——, 113 S.Ct. at 2059. For the statute to be violated, therefore, the gun "must 'facilitat[e] or ha[ve] the potential of facilitating' the drug trafficking offense." *Id.* (quoting *Stewart*, 779 F.2d at 540) (alterations in original). Using a gun to protect one's drugs, drug sales is therefore clearly a prohibited use of the gun. Our prior decisions under § 924(c)(1) recognize as much.

The First Circuit refers to this relationship quite generally as a "facilitative nexus." That court looks only to whether the gun was "kept [where it was] to be available for use" in an ongoing drug offense. *See, e.g., United States v. Paulino*, 13 F.3d 20, 26 (1st Cir.1994). The court's rationale is readily explained: once a person acquires a firearm and puts or keeps it where it can be used more actively in his drug activity, that firearm becomes a part of the drug activity and thus is used by the defendant in relation to the drug activity. It matters little whether the use is described in terms of emboldening the defendant to commit the drug trafficking crime, *see, e.g., Stewart*, 779 F.2d at 540, protecting the defendant's possessory interest in his drugs, *see, e.g., United States v. Young-Bey*, 893 F.2d 178, 181 (8th Cir.1990), or otherwise; any way one puts it, the firearm is being used as part of the drug activity. Therefore, like the First Circuit, we look to whether the gun was positioned so as to be available for use during ongoing drug activity in order to determine whether the use was within the scope of § 924(c)(1).

Note that in order to relate to a drug trafficking offense, the use of the gun need not actually have furthered the offense. As the Supreme Court said in *Smith*, the gun need only "ha[ve] the potential of facilitating" the drug trafficking offense. Indeed, the Supreme Court has consistently held that "[t]he ordinary meaning of the words ['relating to'] is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.'" *Morales v. Trans World Airlines, Inc.*, —— U.S. ——, ——, 112 S.Ct. 2031, 2037, 119 L.Ed.2d 157 (1992) (quoting BLACK'S LAW DICTIONARY 1158 (5th ed. 1979)); *see also District of Columbia v. Greater Washington Board of Trade*, —— U.S. ——, ——, 113 S.Ct. 580, 583, 121 L.Ed.2d 513 (1992) (noting that when the Congress uses the phrase "relates to," it has chosen " 'deliberately expansive' language" (quoting *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 47, 107 S.Ct. 1549, 1552, 95 L.Ed.2d 39 (1987))). The Congress's use of that phrase here was clearly deliberate and an indication that it intended § 924(c)(1) to be a broad prohibition, reaching more than conduct that actively advances the underlying predicate drug offense.

The legislative history of § 924(c)(1) reveals that the Congress expressly retained the "in relation to" requirement in preference to a more restrictive "in furtherance of" requirement. One bill that passed the Senate as part of the legislative process that culminated in the enactment of the current version of § 924(c)(1) would have penalized "[w]hoever, during and in relation to any [one of a number of enumerated drug] felon[ies] . . . uses a firearm, or carries a firearm in furtherance of such crime. . . ." 131 Cong.Rec. 18,155, 18,235 (July 9, 1985) (reprinting S.49, a predecessor bill, as passed by the Senate). The Bureau of Alcohol, Tobbaco, and Firearms criticized this proposal, however. Referring to the then-current version of § 924(c)(1), it argued that because "existing law already requires that the carrying be 'in relation to' the underlying crime," the proposed bill would "weaken[] the existing mandatory penalty provision." 4 U.S.C.C.A.N. 1327, 1346 (1986). Therefore, the "in furtherance of" requirement was deleted. This suggests that the Congress carefully avoided any implication that it intended to nar-

row the relationship that must be shown between the gun and the predicate offense in order to support a conviction under § 924(c)(1).

In sum, it is apparent that positioning a firearm in such a way that it protects or is otherwise integrated into one's drug trafficking is not just a use of that gun, but is a use of that gun in relation to a drug trafficking offense and is therefore covered by the statute. What, then, is sufficient evidence that a gun found at the scene of a drug crime is being used in this way?

Whenever there is sufficient evidence for a jury to find that the defendant at some time during the commission of the predicate drug offense put or kept a firearm in a place where it would be proximate to and accessible from a place that is clearly connected to his drug trafficking (*e.g.*, a place used to store, manufacture, or distribute drugs, or to keep the proceeds of drug transactions), the jury may also infer that the gun was being used to protect the drug trafficking operation, and was therefore being used in violation of § 924(c)(1). We emphasize that the jury may draw this inference regardless whether the predicate offense is one of drug distribution or of possession with intent to distribute drugs; we reject any suggestions to the contrary in our prior opinion. *Cf. Bruce*, 939 F.2d at 1055 ("Since possession with intent subsequently to distribute is in a sense a passive crime, it becomes somewhat difficult analytically to determine how one goes about using a gun in relation to that crime"). As the Eighth Circuit has stated:

> It has become common knowledge that drug traffickers typically keep firearms available to protect themselves and their drugs and drug money. The presence and the availability of the firearms are often crucial to the "success" of the drug enterprise. It is therefore permissible for juries to infer that firearms found among a drug trafficker's paraphernalia are used to further the drug venture and are thus used during and in relation to drug trafficking within the meaning of section 924(c)(1).

United States v. Young-Bey, 893 F.2d 178, 181 (8th Cir.1990).

Obviously, a defendant is free to present evidence that he possessed the gun solely for a different purpose—for example, as part of a collection of guns that just happened to be kept in a place that later became involved in drug trafficking. *See, e.g., United States v. Vincent*, 20 F.3d 229, 234-35 (6th Cir.1994) (noting that defendant had argued that he was a gun collector); *United States v. Morrow*, 923 F.2d 427, 535 (6th Cir.1991) (noting that defendant had "strenuously argued at trial that the only purpose for the gun was to shoot snakes"). It will be the duty of the trier of fact, however, and emphatically not of this court, to weigh all such evidence and to determine whether, as a matter of fact, the weapon was being used as part of a drug trafficking operation.

This test for use is not only an accurate means of ensuring that the scope of § 924(c)(1) is as broad as the Congress intended it to be; it will also avoid the problems with the *Bruce-Morris-Derr* approach that we outlined above. First, as we have already noted, placing or keeping a gun in such a way that it protects a drug trafficking operation is clearly a "use" of a gun "in relation to a drug trafficking offense." In most cases, the gun's proximity to and accessibility from the actual site of the defendant's drug trafficking will be the most probative evidence that the defendant was using the firearm to protect his drug trafficking. Similarly, whether the defendant carried the gun with, or to or from the location of, the drugs will be the most probative evidence that he carried it during and in relation to a drug trafficking offense. Second, this test can be readily administered both by the district court, which must determine whether the Government's case may go to the jury, and by the appellate panel that must determine whether the evidence

was sufficient to support a conviction under § 924(c)(1). As such, it will assure greater uniformity across cases while penalizing more precisely the conduct that the Congress intended to reach.

C. Application of the Standard

Applying the standard for "use" to the present cases, we hold that the Government presented sufficient evidence to convict both Bailey and Robinson. When Bailey was arrested, there were 30 grams of cocaine, more than $3,200 in cash, and a loaded 9-mm. pistol in his car. He was properly convicted of possession with the intent to distribute the cocaine. Because the gun was found in the same place as the cash (namely, the trunk) and in the same car as the drugs that formed the basis of his drug trafficking conviction, the jury was entitled to infer that the money was the proceeds of an ongoing drug operation. The requirements of proximity and accessibility were both satisfied. The gun was proximate to the drugs and was easily accessible to Bailey at any time that he was handling either the drugs or the proceeds of the sale. The jury could reasonably infer that Bailey had intentionally incorporated the gun into his drug operation, was using it as part of that operation, and was therefore using it in relation to his possession with intent to distribute the drugs. Although the record does not demonstrate that Bailey had made a specific drug sale (the amount of money he had notwithstanding), there is little reason to doubt that he was using the gun in relation to the possessory offense regardless whether the gun actually furthered the possessory offense or emboldened him to commit that offense. It is enough that the jury was entitled to conclude that Bailey had put the gun into the car not for some unrelated purpose but because he was keeping drugs there; that alone establishes that the gun was used in relation to Bailey's drug trafficking offense. We therefore affirm his conviction.

The same analysis requires that we affirm Robinson's conviction. In her case, the firearm was found in the same locked trunk as were the drugs that formed the basis of her conviction for possession with intent to distribute. Again, the requirements of proximity and accessibility are obviously satisfied: The gun was proximate to the drugs, and it was accessible to anyone, such as Robinson, who had access to the drugs. Because the jury found beyond a reasonable doubt that the drugs were Robinson's—a finding not at issue here—it could also infer from these facts that Robinson placed or kept the gun in the same location as the drugs in order to protect her possession of the drugs. Hence, the jury was entitled to conclude that Robinson used the gun in relation to the drug trafficking offense.

III. Conclusion

In sum, we reject the open-ended *Bruce-Morris-Derr* approach and conclude instead that in order to survive a challenge to the sufficiency of the evidence for a conviction under § 924(c)(1), the Government need only point to evidence that the firearm in question was in proximity to the drugs, drug paraphernalia, or drug proceeds and was accessible to the defendant from the site of the drugs, drug paraphernalia, or drug proceeds involved in his or her predicate drug trafficking offense. When there is evidence of proximity and accessibility, we will affirm a conviction under § 924(c)(1). Because the government presented such evidence at the trials of both Bailey and Robinson, the judments of conviction in each case are

Affirmed.

WALD, Circuit Judge, dissenting:

There are four reasons why I believe the majority's bright line test for determining whether a gun has been "used" to commit a drug offense is wrong. First: Although I agree that "use" under 18 U.S.C. § 924(c)(1) requires the government to show that the gun in some way "facilitated" the defendants's commission of the underlying drug offense, *see United States v. Jefferson*, 974 F.2d 201, 205 (D.C.Cir.1992), the sticking point is what kind of evidence it takes to make that showing. The *Bruce-Morris-Derr* line of cases did not in that sense set forth any test or formula for making such a determination; rather, it provided only a list of potentially relevant factors, *i.e.*, the type of weapon involved, whether it was loaded, the presence of expert testimony to support the government's theory of "use," the proximity of the gun to the drugs, and the accessibility of the gun to the defendant. By focusing on only two of the factors—(1) proximity of guns to drugs, drug paraphernalia, or drug proceeds and (2) accessibility of the guns to the defendant from a place used to store drugs, drug paraphernalia, or drug proceeds—to the exclusion of any other relevant factors, the majority in my view diminishes rather than enhances the prospect of accurate assessment on a case-by-case basis as to whether the gun was used to facilitate the drug offense. Congress, it should be noted, created no statutory presumption that "use" automatically would follow from the presence of any particular factors, and I can find no authority for courts to do so.

Rather than furnishing a clear and predictable guide for judges and juries, the majority's new "proximity and accessibilty" test offers only a straightjacket from which judges must inevitably strain to escape, as they are confronted with a steady stream of new fact situations. But the circumstances at which they must look to justify any exception will almost certainly be the very factors mentioned in the much-maligned *Bruce-Morris-Derr* cases, *i.e.*, *United States v. Bruce*, 939 F.2d 1053, 1055-56

(D.C.Cir.1991), *United States v. Morris*, 977 F.2d 617, 62-22 (D.C.Cir.1992), and *United States v. Derr*, 990 F.2d 1330, 1338 (D.C.Cir.1993)—the size and type of the gun, whether it was loaded, and the presence or absence of ammunition. Succumbing to "certainty's siren call," the majority would prohibit a reviewing judge from looking at any of these factors in deciding whether there was enough evidence in a particular trial record to justify an inference that the defendant used the guns to facilitate the drug offense.

Second: Because the majority's ruling in this *in banc* decision will predictability be promptly reduced to new jury instructions, it seems passing strange to say that the proximity and accessibility test minimizes interference with jury discretion. *See* Opinion ("Maj.Op.") at 111-12. What the majority is actually doing is artificially limiting the factors that the jury may legitimately consider when determining whether a defendant "used" a firearm during and in relation to the underlying drug offense. In so doing it is impermissibly curbing the jury's discretion to consider the totality of circumstances that might be relevant to that fact-bound determination.

Third: The new test is not only unduly rigid, it is not even clear. I cannot fathom how the accessibility prong, as defined by the majority, will work, or what indeed it adds to the minimal proximity test. It seems that whenever the guns are located proximately to the drugs, they must also be potentially accessible to the defendant *from the place the drugs are being stored*. Op. at 115. Thus if the guns and drugs are found altogether in a locked strongbox and the defendant is miles away, under the majority's test, the guns are arguably accessible to the defendant from the place where the drugs are stored and are being "used" to facilitate the possession of the drugs. To state the proposition is to reveal its illogic. Under the statute it is the defendant who must use the gun, so it is the accessibility of the gun to him at the time of

the drug offense charged that is relevant, not the accessibility of the gun to a phantom defendant who is positioned where the drugs are. This latter definition of accessibility makes no sense whatsoever. Indeed, the majority's peculiar definition of accessibility renders their "use" test much looser than that endorsed by several other circuits, which at least focus on whether the guns were proximate to the defendant as opposed to merely accessible from the place where the drugs, drug paraphernalia, or drug proceeds are stored. *See, e.g., United States v. Theodoropoulos,* 866 F.2d 587, 597-98 (3d Cir.1989) (guns located in trash can on back porch of apartment not proximate enough to defendant to fit within § 924(c)); *United States v. McKinnell,* 888 F.2d 669, 675 (10th Cir.1989) ("use" element of § 924(c)(1) met when defendant had "ready access" to firearm, which was located within easy reach of defendant).

Fourth: In those cases like Bailey's that involve the distribution or actual possession of drugs, application of the new proximity and accessibility test or the old relevant factors approach of *Bruce-Morris-Derr* will not likely make much difference. But in the trickier cases where the crime being charged is possession with intent to distribute and the defendant himself is not in the immediate vicinity of the scene where the drugs and guns are found, the majority's test can produce a ridiculous result. This was the situation in *Derr* and *Robinson.* In *Derr,* 990 F.2d at 1332, and *Robinson,* 997 F.2d 884, 885 (D.C. Cir.1993), the defendant was not even in the same room as the unloaded guns, which were secreted along with the drugs in a locked place (closet in *Derr,* footlocker in *Robinson*). The crime was possession (constructive) with intent to distribute and the issue in both cases was whether the gun was being used to facilitate that possession. Although the majority would presumably find sufficient evidence to convict under § 924(c)(1) in both cases because the guns were proximate to the drugs and would have been accessible to each defendant once he

or she reached the place where the drugs were being stored, I do not see how this result can be right. A defendant cannot have been "using" a gun to protect drugs when he was nowhere near the gun. A robber or competitor drug dealer who broke into the apartment would have been able to force the lock open without an iota of fear from the gun within because no one was there to use it.

I agree with Judge Williams that we must honor the ordinary meaning of words used by Congress, *see Perrin v. United States,* 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979); section 924(c) requires us to ask whether the gun was used to commit the drug trafficking crime for which the defendant was convicted, not whether the gun might have been used at some past or future time to commit some other past or future drug trafficking crime. *See Bruce,* 939 F.2d at 1055. To answer the right question, the jury and a reviewing court needs access to all relevant information in order to replicate the real life scenario involving the guns, the drugs, and the defendant so that it can then decide if the defendant was in fact using the gun to facilitate the drug offense. The majority effectively leaves out the defendant altogether in its streamlined test; unfortunately, in so doing it distorts the plain meaning of the law, dispenses with logic, and invades jury discretion as well.

Finally, while I find Judge Williams' narrower interpretation of "use" quite persuasive, I cannot go so far as to agree that an actor who has intentionally placed a gun within easy access of his person in order to guard or to distribute drugs is not using the gun to facilitate the drug offense unless he openly brandishes, displays, or makes verbal threats about the gun. Where evidence of ready access to a gun by the defendant guarding or distributing the drugs exists, I think the jury can fairly draw the inference that such access is an intrinsic part of the criminal drug trafficking act. But conversely, I do not, like

the majority, think it a fair inference that where the defendant has no such ready access to the gun, but instead is shown merely to be in constructive possession of the drugs which are located near the gun but away from the defendant, he is nonetheless using the gun to facilitate his possession or distribution. That I believe to be the principal difference between the other dissenters and myself, since I agree with them that "use" involves activity of some sort by a defendant who is in the immediate vicinity of the weapon, and not mere placement of the weapon near the drugs. That difference, however, is of sufficient import so as not to allow me to subscribe to Judge Williams' bright line rule any more than the majority's. Bright lines have a place in our jurisprudence but primarily with respect to what third parties like policemen or citizens can do without running afoul of the law. They are distinctly less useful in telling juries or judges what kind of evidence will suffice to show that a defendant is guilty of a generic crime that can be committed against a thousand different factual backdrops.

Because I believe that there was sufficient evidence to support Bailey's conviction for use in relation to actual possession of drugs with intent to distribute, *i.e.*, the gun in the trunk of the car was readily accessible to protect the drugs in the passenger compartment, but not Robinson's, *i.e.*, there was proof only of drugs and an unloaded gun in a locked trunk in a bedroom closet, I would affirm the first conviction and reverse the second. I would not adopt the majority's proximity and accessibility test but would instead continue to allow juries and judges to rely on all relevant factors to decide each case.

STEPHEN F. WILLIAMS, Circuit Judge, with whom SILBERMAN and BUCKLEY, Circuit Judges, join, dissenting:

Nearly all of our sister circuits say that mere possession of a firearm does not constitute "use" under 18 U.S.C. § 924(c). In the same breath, however, all—joined today by this court—allow conviction without evidence of the defendant's firing, brandishing, displaying or actively using the firearm in any way.[1] In joining the other circuits, the court undoubtedly simplifies our previous vague multifactored balancing test for review of § 924(c) cases for sufficiency of the evidence. And the majority is surely right that it is perfectly appropriate to overturn statutory interpretations where, as here, the precedent rejected is "fundamentally flawed", *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 876 (D.C. Cir.1992) (en banc), and of course especially where, again as here, the precedent acts as "a positive detriment to coherence and consistency in the law . . . because of inherent confusion created by an unworkable decision". *Id.* (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 173, 109 S.Ct. 2363, 2371, 105 L.Ed.2d 132 (1989)). In recent years, our cases have produced such inconsistency largely because we have failed to identify a clear definition of the term "use" of a firearm; it is that failure that has led to our frequent second-guessing of juries. In attempting to mend the incoherence of our previous approach by articulating a "proximity" plus "ac-

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[1] Maj. Op. at 113-14. For a representative sampling, see *United States v. McFadden*, 13 F.3d 463, 465 (1st Cir.1994); *United States v. Breckenridge*, 782 F.2d 1317, 1322-23 (5th Cir.1986); *United States v. Lyman*, 892 F.2d 751, 753 (8th Cir.1989); *United States v. Harmon*, 996 F.2d 256, 258 (10th Cir.1993); *United States v. Poole*, 878 F.2d 1389, 1393 (11th Cir.1989). Other circuits are more honest. *United States v. Meggett*, 875 F.2d 24, 28 (2d Cir.1989) ("mere possession of a gun can constitute use"); *United States v. Torres-Rodriguez*, 930 F.2d 1375, 1385 (9th Cir. 1991) (same).

cessibility" test, however, the court has in effect diluted "use" to mean simply possession with a floating intent to use. In all but the rarest case, then, a defendant will be subject to punishment under § 924(c) if guilty of a drug trafficking offense and, while committing the offense, was in possession of a firearm. I think the wording, history and context of § 924(c) call for a different bright-line rule—one requiring active "use" rather than possession with a contingent intent to use.

* * * *

Section 924(c) imposes five additional years of punishment on

> Whoever, during and in relation to any crime of violence or drug trafficking crime . . . *uses* or carries a firearm.

18 U.S.C. § 924(c)(1) (emphasis added).

The word "use" in ordinary language normally implies activity. Cf. *United States v. McFadden,* 13 F.2d 463, 467 (1st Cir.1994) (Breyer, J., dissenting) ("the ordinary meanings of the words 'use' and 'carry' . . . connote activity beyond simple possession"). The majority asserts that a gun placed in one's drawer with an intent to use it in the event of an intruder is "in common parlance, [] a gun 'used' for domestic protection". Op. at 114. This is possible in some contexts, but they are contexts in which the fact of "use" is *assumed.* Q: "What do you use the gun for?" A: "I use it to protect my family." In that hypothetical the answerer accepts the questioner's premise that the gun is in some sense used. But as the question assumes something that is not established, the answerer might well go back to the premise: A: "Actually, I've never had to use it. I keep it here in case of an intruder."

In support of its sweeping idea of the plain meaning of "use", the majority cites *Astor v. Merritt,* 111 U.S. 202, 4 S.Ct. 413, 28 L.Ed. 401 (1884). The case illustrates the importance of context. The plaintiff, William Astor, sought a refund of customs duties of $1,880 (in 1878 dollars) paid on clothing he had purchased in Europe for personal use but had not yet worn at the time he re-entered the United States. The statute provided an exemption for "[w]earing apparel in actual use and other personal effects (not merchandise), . . . of persons arriving in the United States", *id.* at 203, 4 S.Ct. at 413 (citing § 2505 of the Revised Statutes, p. 489, 2d ed.), and the government had prevailed below by arguing that "actual use" required that each particular item of clothing have been worn before importation. The Court instead found that the term "actual use" must be read in light of the basic distinction drawn by the statute between articles that are "personal effects of [the traveller], and not merchandise, and not for sale," *id.* at 214, 4 S.Ct. at 419, and thus sought a meaning for "actual use" that, "while it comports with the ordinary habits of passengers and travellers, will not open the door for fraud." *Id.* Any meaning that required past wearing was plainly incompatible with that purpose. No such incompatibility with statutory purpose is created by reading "use" in § 924(c) to require some sort of active use, as opposed to simple possession with a view to possible future use. Aside from *Astor*'s emphasis on context, its expansive interpretation of the word "use" to protect travellers hardly raises the same issues as does an expansive interpretation of a term in a criminal statute.

Part of that context consists of § 924(c)'s origins. The initial version, passed in 1968, reads as follows:

> Whoever—
>
> (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States,

> shall be sentenced to a term of imprisonment for not leses than one year nor more than 10 years.

Pub.L. No. 90-351, 82 Stat. 233 (1968). In its 1968 form, the statute suggests that Congress had active employment of a weapon in mind. The phrase "uses *to commit*" implies that the defendant derived actual service from the weapon in completing an unlawful act. This service might take the form of injuring one's opposition by firing it, intimidating opponents by displaying or brandishing it, or offering it in exchange to complete an unlawful commercial transaction. It does not, however, imply merely potential service—i.e., keeping it hidden from view, intending to use it only if a contingency should arise. For the gun in that instance has not actually been used to commit the crime; its only function is to make successful completion more probable under contingencies that have not arisen.

In 1984, Congress made two basic changes: it raised the sentence enhancement to exactly five years and it both broadened and narrowed the scope of predicate offenses from "any felony" to "any crime of violence". At the same time, it collapsed the two clauses into one, substituting the phrase "during and in relation to" the predicate crimes for the earlier provisions linking the firearm to the predicate crimes. The statute then read:

> Whoever, during and in relation to any crime of violence, including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence, be sentenced to imprisonment for five years.

Pub.L. No. 98-473, 98 Stat. 2138 (1984). Congress gave two reasons for rewriting the statute, neither of which pertained to the scope of the term "use" or "carry". S.Rep. No. 225, 98th Cong., 2d Sess. 1, 312-13, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3490-91 ("Part D of title X represents a complete revision of subsection 924(c) *to overcome the problems with the present subsection discussed [below]*") (emphasis added). First, it sought to clarify the statute's approach to suspended and concurrent sentences. Second, it wished to overcome the Supreme Court's holdings in *Simpson v. United States*, 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed.2d 70 (1978), and *Busic v. United States*, 446 U.S. 398, 100 S.Ct. 1747, 64 L.Ed. 2d 381 (1980), which negated the use of § 924(c) when another firearm penalty enhancement provision, such as that for armed robbery under 18 U.S.C. § 2113(d), applied. The government points to no evidence that in 1984 Congress sought to expand the meaning of "use". Moreover, Congress's adoption of the connective phrase "during and in relation to" could not have been intended to adjust for evolving problems of passive drug crimes; Congress only added drug trafficking offenses as predicate crimes in 1986. Pub.L. No. 99-308, 100 Stat. 456 (1986).

Moreover, the Senate Report relating to the 1984 change gave examples of use, both of them active: "pointing it at a teller or otherwise displaying it whether or not it is fired." S.Rep. No. 225, 98th Cong., 2d Sess. 1, 314, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3492. While these examples were not presented as exhaustive, they provide insight into the general class of behavior Congress had in mind. Even more indicative is the Senate Report's commentary on the "carry" provision which reads:

> Evidence that the defendant had a gun in his pocket but did not display it, or refer to it, could nevertheless support a conviction for "carrying" a firearm in relation to the crime if from the circumstances or otherwise it could be found that the defendant *intended to use* the gun if a contingency arose or to make his escape. . . . Moreover, the requirement that

> the firearm's use or possession be "in relation to" the crime would preclude its application in a situation where its presence played no part in the crime, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight.

Id. at 3492 n. 10 (emphasis added). The reference to intended use shows that Congress envisioned the "carry" provision to punish a defendant who did not "display" or otherwise actively use the firearm, but who had at least taken the active step of carrying the gun on a drug trafficking foray. Thus the Senate evidently saw "use" as a comparatively narrow term, with "carry" picking up cases of an alternative type of activity, where the defendant did not actively "use" the weapon. The majority has turned this relation around, giving "use" such a broad meaning as to leave no apparent role for "carry".

Another element of § 924(c)'s context is the kindred provision, § 924(d), adopted in its original form in 1968, four months before the original § 924(c) "use or carry" provision. Pub.L. No. 90-351, 82 Stat. 233 (1968). The current version of § 924(d) provides for forfeiture of firearms "used in any knowing violation" of certain enumerated offenses (such as unlawful interstate transport and false statements in acquiring firearms), and of firearms "intended to be used" in other enumerated offenses (such as crimes of violence and drug trafficking crimes). 18 U.S.C. § 924(d)(1). Thus Congress, clearly quite alert to the distinction between firearms "used" in commission of a crime and merely "intended" for such use, provided for forfeiture *before* the weapon was used in drug trafficking, to nip the risk in the bud, apparently saving § 924(c)'s five years additional imprisonment for cases of actual use. "[U]sing a firearm" should not have a "different meaning in § 924(c)(1) than it does in § 924(d)". *Smith v. United States*, —— U.S. ——, ——, 113 S.Ct. 2050, 2057, 124 L.Ed.2d 138 (1993).

Smith also observed, to be sure, that "it is clear from § 924(d)(3) that one who transports, exports, sells or

trades a firearm 'uses' it within the meaning of § 924(d)(1)". *Id.* The Court inferred this from the specific statutes as to which § 924(d)(1) creates forfeiture liability, including, for example, 18 U.S.C. § 922(a)(5) (unlicensed transfer of a firearm to a resident of a different state); *id.* § 922(*l*) (importation of firearms). See *Smith*, —— U.S. at —— n. *, 113 S.Ct. at 2057 n. *. All of these, some of which the Court generalized under the word "transport", will nearly always involve active manipulation of the firearm. Given § 924(c)'s explicit "carry" provision, the parallelism inferred by the Court in *Smith* may not be complete. That does little, I think, to undermine § 924(d)'s value in evidencing congressional alertness to the difference between "use" and intent to use.

Congress was also explicitly conscious of the relation between § 924(c) and 18 U.S.C. § 2113(d), which provides sharply increased penalties for one who, committing a bank robebry or theft in violation of 18 U.S.C. § 2113(a) or (b), "assaults any person, or puts in jeopardy the life of any person by the *use* of a dangerous weapon or device". 18 U.S.C. § 2113(d) (emphasis added). The Senate Report in 1984 mentioned § 2113(d) and made clear that it intended that some defendants might be subject to *both* enhancements. S.Rep. No. 225, 98th Cong., 2d Sess. 1, 314, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3492. In his brief before the Supreme Court in *McLaughlin v. United States*, 476 U.S. 16, 106 S.Ct. 1677, 90 L.Ed.2d 15 (1986), the Solicitor General of the United States used that history to sketch out a view of the intended meanings of "use" and "carry" in § 924(c). In *McLaughlin*, where the court held that an unloaded gun could be a "dangerous weapon" under that statute, the Solicitor General argued that weapons that are concealed and unmentioned do *not* suffice for conviction under the aggravated robbery statute (18 U.S.C. § 2113(d)) because "the robber has not 'used' the weapon to 'assault' anyone". Brief for the United States at 19,

McLaughlin (No. 85-5189). He went on to press the point about the relative narrowness of the word "use" and the parallelism between § 924(c) and § 2113(d):

> *It appears that Congress is of the view that something more than the carrying of a gun is required to establish its use.* In response to this Court's decisions[,] *Simpson v. United States*, 435 U.S. 6 [98 S.Ct. 909, 55 L.Ed.2d 70] (1978), and *Busic v. United States*, 446 U.S. 398 [100 S.Ct. 1747, 64 L.Ed.2d 381] (1980), Congress amended 18 U.S.C. [§] 924(c) in 1984 to provide an additional penalty of five years' imprisonment for anyone who "uses or carries" a firearm during a crime of violence, including a "crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device." Thus, the additional penalty of Section 924(c) now applies even though the defendant is convicted under a provision like Section 2113(d) that provides for an enhanced penalty for the use of a dangerous weapon or device. In spelling that out in the legislative history, in fact, Congress used Section 2113(d) as an example, stating that a person convicted under Section 2113(d) would also be subject to five years' imprisonment under Section 924(c) if the dangerous weapon or device was a firearm. S.Rep. 98-225, 98th Cong., 1st Sess. 313-314 (1983). In its example, the Senate report referred to "using a gun * * * by pointing it at a teller or otherwise displaying it." *Id.* at 314 [1984 U.S.C.C.A.N. 3492]. In a footnote, the report noted that "evidence that the defendant had a gun in his pocket but did not display it, or refer to it, could nevertheless support a conviction for 'carrying' a firearm" under Section 924(c). S.Rep. 98-225, *supra*, at 314 n. 10 [1984 U.S.C.C.A.N. 3492]. Thus, Congress appeared to understand, as the language of Section 924(c) suggests, that there is a distinction between carrying a gun and using a gun.

Id. at 19 n. 18 (emphasis added). Of course we owe no special deference to the views of the Solicitor General. Cf. *Crandon v. United States*, 494 U.S. 152, 177-78, 110 S.Ct. 997, 1011, 108 L.Ed.2d 132 (1990) (Scalia, J., concurring) (no deference owed to Department of Justice on interpretation of criminal statutes as they are "not administered by any agency but the courts"). Where he strongly presses a narrow reading of specific language in a criminal statute, however, it is certainly some evidence that that interpretation is a reasonable one, suggesting that, in the presence of another arguably reasonable reading, we are at least confronting a statutory ambiguity that under the rule of lenity should be resolved in favor of the narrow construction. In *United States v. Ray*, 21 F.3d 1134 (D.C.Cir.1994), we relied heavily on the Solicitor General's *McLaughlin* brief, saying, in our exposition of the word "use," "It is the brandishing or displaying, in other words, that the Court [in *McLaughlin*] said heightened the danger". *Id.* at 1137. We concluded that a defendant might "use" a concealed weapon (within the meaning of § 2113(d)) when he actively exploits its existence by *threatening* people with it. *Id.* at 1140-42. I would preserve the parallel treatment between "use" in both § 924(c) and § 2113(d), and require comparable activity.[2]

Nothing in *Smith* precludes limiting "use" to active employment. Its statement that "§ 924(c)(1)'s language sweeps broadly", —— U.S. at ——, 113 S.Ct. at 2054, means only that the proscribed use of firearms is not

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[2] The majority points out that the crime at issue in *McLaughlin* and *Ray*, bank robbery involving assault or jeopardizing a person's life, inherently involves force or the threat of force, and suggests that while reading "use" narrowly to cover only open brandishing or verbal allusions made sense there, a broader reading is necessary for a furtive crime such as possession of drugs. Maj. Op. at 115 n. 1. But the point of the Solicitor General's brief in *McLaughlin* was that Congress intended a consistent (and relatively narrow) reading of the word "use" in both contexts, § 2113(d) and the relatively generic § 924(c).

limited to the obvious or typical ways in which they may assist in the commission of a crime. Rather, a gun may be "used" regardless of whether it acts as an instrument to shoot, to bludgeon, or for exchange. That is, whether a firearm is "used" does not depend on whether it is employed in the customary way or a more creative way. But it does depend on whether the gun is employed at all, and nothing the Court said expands "use" beyond active employment. The observation that a gun "at least must 'facilitat[e] or ha[ve] *the potential* of facilitating' ", *id.* at ——, 113 S.Ct. at 2059 (emphasis added), does not support an expanded definition of "use"; the Court made that point in reference to the separate "in relation to" requirement.

While the majority attempts to fine-tune the concept of facilitation (and thereby, use) through its twin guideposts of proximity and accessibility, the ultimate result is that possession amounts to "use" because possession enhances the defendant's confidence.[3] See Op. at 113, 116; *McFadden*, 13 F.3d at 466. Had Congress intended that, all it need have mentioned is possession. Cf. 18 U.S.C. § 929(a) (additional punishment for one who "uses or carries a firearm *and is in possession* of armour piercing ammunition") (emphasis added). In this regard, the majority's test is either so broad as to assure automatic affirmance of any jury conviction or, if not so broad, is unlikely to produce a clear guideline. Thus, if the new standard proves anything less than a carte blanche for conviction, it will lead to the same sort of continuous and vacillating review of jury verdicts that our past jurisprudence has yielded and that the court so rightly deplores.

* * * *

[3] Occasionally, and quite understandably, a court taking the majority's view will forget even the veneer of a requirement of more than possession in connection with the predicate crime. "[Defendant] was also convicted of two or three counts of *use or possession* of a firearm in connection with drug trafficking crimes in violation of 18 U.S.C. § 924(c)(1)." *United States v. Windom*, 19 F.3d 1190, 1192 (7th Cir.1994) (emphasis added).

Under my view of "use" there can be no serious argument that either Robinson or Bailey "used" the weapons as to which they were charged under § 924(c). But Bailey plainly transported his firearm in the trunk of his car, and the jury in his case was instructed to find whether the defendant had "used or carried" the weapon. Thus the question arises whether transportation of a firearm under these circumstances can sustain a conviction for carrying a firearm.

We have found "carry" to cover a gun carried, not on the defendant's person, but on that of a confederate and within easy reach of the defendant himself. *United States v. Joseph*, 892 F.2d 118, 126 (D.C.Cir.1989) (defendant at all times "within a few steps of, and usually no more than an arm's span from, the firearm"). We have also held that a jury could find that a defendant's control over confederates who carried weapons was enough to establish constructive possession, *United States v. Harrison*, 931 F.2d 65, 71 (D.C.Cir.1991), and thus upheld the conviction (which alternatively might have been sustained on a theory of aiding and abetting). The same understanding embraces the defendant who transports a weapon by motor vehicle *and* has as ready access to the weapon as he would if it were in his pocket. See, *e.g.*, *United States v. Cardenas*, 864 F.2d 1528, 1533 (10th Cir.1989) (the gun "was within effortless reach of his hands, more accessible than if it were in his own pocket"). Both readings are consistent with the basic concept of carrying a weapon on one's person (hand, pocket or holster), extended to catch the criminal who uses either confederates or mechanical transport (car, truck, ship or plane) to keep the firearm moving with him. In the motor vehicle case, the location of the weapon can render it as readily accessible as one held by an associate—if it is on hand for instant use, e.g., tucked under the driver's seat or resting on the dashboard or front passenger's seat.

I do not believe § 924(c) can properly be extended from these situations to that of the defendant who, like Bailey, transports the weapon in his car but is not shown to have had immediate access at any time while he was committing his drug trafficking offense. The effect would be to have § 924(c) embrace virtually every instance where a drug trafficker transports a weapon; in view of Congress's provision of a separate penalty in an adjacent section for anyone who "transports" a weapon with intent to commit a crime punishable by as much as a year's imprisonment, 18 U.S.C. § 924(b), that seems an improbable duplication. Cf. *Cardenas*, 864 F.2d at 1534-35 (rejecting equation of "carry" with "transport"). Rather, consonant with an active notion of "use", with the Senate Report's example of a weapon carried in the defendant's pocket, see *supra* at 122, and with the principle of the "constructive possession" cases that the defendant may use the gun on a moment's notice, the word "carry" must entail immediate availability. Thus, the gun locked in the trunk of Bailey's car was not accessible enough to support a conviction for carrying the gun during and in relation to his possession with intent to distribute drugs.

That is not to say that a defendant arrested with a gun in his trunk may never be convicted under § 924(c). Realistically, drug dealers often operate out of car trunks, returning from a distribution station to replenish drugs, deposit cash or retrieve a weapon. If the government presents evidence that the defendant handled the weapon by placing it in the car "during and in relation to" action taken in the commission of a predicate offense, that evidence would be sufficient to sustain a conviction. Alternatively, there may be cases where the government can prove that the defendant bought the firearm such a short time before arrest on the drug trafficking offense as to sustain an inference (beyond a reasonable doubt) that he must have been handling it simultaneously with commission of the drug offense. But as a gun can obviously

rest in a trunk for a long period, the mere fact of a gun's presence there, coupled with the defendant's use of the car for drug distribution, does not give rise to an inference of the necessary simultaneity of immediate access to the weapon (in a context of moving it about) and commission of the predicate crime. As there appears to be no evidence in the record against Bailey beyond his drug trafficking and the location of the weapon in the trunk, his conviction cannot be sustained on such a ground.

* * * *

The majority's expansive view of "use" virtually emasculates the role of the term "carry" in the statute. If "use" is understood to require real activity (such as brandishing, displaying or threatening), and "carry" to require conveying the firearm, coupled with immediate ability to put it to active use, both terms will have a meaningful yet distinct content, consistent with the language, context and legislative history of § 924(c).

* * * *

I would reverse the convictions of both Bailey and Robinson.

SILBERMAN, Circuit Judge, dissenting:

I think it most unfortunate that the majority opinion is directed, virtually entirely, at our past precedent dealing with the difficult question presented. We agreed, through the *en banc*ing of these cases, that we needed to think harder about § 924(c) to see if we could arrive at a more coherent standard firmly rooted in the statute. The standard advanced in Judge Williams' lucid opinion represents the product of that rethinking—at least on the part of the dissenters—and I would have thought that the majority might have marshaled the effort to confront fully the analysis set forth in the dissent.

SUPREME COURT OF THE UNITED STATES

No. 94-7492

CANDISHA SUMMERITA ROBINSON,
aka CANDYSHA ROBINSON,
Petitioner

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. This case is consolidated with 94-7448, *Roland J. Bailey v. United States,* and a total of one hour is allotted for oral argument.

April 17, 1995

Nos. 94-7448, 94-7492

Supreme Court, U.S.
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JUN 30 1995
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In the Supreme Court of the United States

OCTOBER TERM, 1995

ROLAND J. BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

CANDISHA S. ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

Whether the 5-4 decision of the court below misinterpreted 18 U.S.C. § 924(c)(1) – which imposes a mandatory 5-year consecutive sentence on a person who "uses or carries" a firearm "during and in relation to" a drug-trafficking offense – by adopting a standard that looks solely to the "proximity and accessibility" of the firearm to the drugs, drug paraphernalia, or drug proceeds, rather than to active employment of the firearm or to other relevant factors such as the type of weapon involved, whether it was loaded and ready to fire, and the presence of expert testimony to support the government's theory of "use."

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Green v. *Bock Laundry Machine Co.*, 490 U.S. 504 (1989)	44
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King v. *St. Vincent's Hospital*, 502 U.S. 215 (1991)	19
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United States v. *Conner*, 972 F.2d 1172 (10th Cir. 1992)	45
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United States v. *Feliz-Cordero*, 859 F.2d 250 (2d Cir. 1988)	45, 46
United States v. *Fermin*, 32 F.3d 674 (2d Cir. 1994), cert. denied, 115 S. Ct. 1145 (1995)	45
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United States v. *Gutierrez-Silva*, 983 F.2d 123 (8th Cir. 1993)	46
United States v. *Long*, 905 F.2d 1572 (D.C. Cir.), cert. denied, 498 U.S. 948 (1990)	12, 14, 33, 38
United States v. *McFadden*, 13 F.3d 463 (1st Cir. 1994)	*passim*
United States v. *McKinnell*, 888 F.2d 669 (10th Cir. 1989)	45
United States v. *Morris*, 977 F.2d 617 (D.C. Cir. 1992)	45, 46
United States v. *Paz*, 927 F.2d 176 (4th Cir. 1991)	36
United States v. *R.L.C.*, 503 U.S. 291 (1992)	33, 34

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United States v. *Reyes*, 930 F.2d 310 (3d Cir. 1991) 45

United States v. *Ron Pair Enters., Inc.*, 489 U.S. 235 (1989) 13

United States v. *Stewart*, 779 F.2d 538 (9th Cir. 1985), cert. denied, 484 U.S. 867 (1987) 28

United States v. *Sullivan*, 919 F.2d 1403 (10th Cir. 1990), cert. denied, 113 S. Ct. 1013 (1993) 42

United States v. *Theodoropoulos*, 866 F.2d 587 (3d Cir. 1989) 45

United States v. *Williams*, 952 F.2d 418 (D.C. Cir.), cert. denied, 113 S.Ct. 148 (1992) 46

United States v. *Willis*, 6 F.3d 257 (5th Cir. 1993) 46

United States v. *Wilson*, 884 F.2d 174 (5th Cir. 1989) 36

Statutes and Sentencing Guidelines:

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18 U.S.C. § 922(a)(1) 21

18 U.S.C. § 922(a)(3) 21

18 U.S.C. § 922(a)(5) 21

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18 U.S.C. § 922(*l*) 21

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Miscellaneous:

114 Cong. Rec. (1968):

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pp. 21,765-21,766 23
p. 21,770 23
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128 Cong. Rec. (1982):

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129 Cong. Rec. (1983):

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Black's Law Dictionary (6th ed. 1990) 15

Comprehensive Crime Control Act of 1983: Hearings on S. 829 Before the Subcommittee on Criminal Law of the Senate Committee on the Judiciary, 98th Cong., 1st Sess. (1983) 25, 26

H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 4410 24

H.R. Conf. Rep. No. 3355, 103d Cong., 2d Sess., *reprinted in* 1994 U.S.C.C.A.N. 1839 21

H.R. Rep. No. 1577, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 4410 22

H.R. Rep. No. 495, 99th Cong., 2d Sess., *reprinted in* 1986 U.S.C.C.A.N. 1327 . . . . . *passim*

The New Shorter Oxford English Dictionary (1993) 16

S. 49, 99th Cong., 1st Sess. (1985) 31

S. Rep. No. 1501, 90th Cong., 2d Sess. (1968) 22

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S. Rep. No. 225, 98th Cong., 2d Sess. (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182	*passim*
S. Rep. No. 583, 98th Cong., 2d Sess. (1984)	31
Webster's II New Riverside University Dictionary (1984)	16
Webster's New International Dictionary of English Language (2d ed. 1949)	15

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the en banc court of appeals (J.A. 78-119) is reported at 36 F.3d 106. The order granting rehearing en banc in *Bailey* (J.A. 33) is reported at 4 F.3d 1004. The panel opinion in *Bailey* (J.A. 17-32) is reported at 995 F.2d 1113. The panel opinion (J.A. 47-76) and the order granting rehearing en banc (J.A. 77) in *Robinson* are reported together at 997 F.2d 884. The opinion of the district court denying a motion for judgment of acquittal in *Robinson* (J.A. 38-46) is reported at 779 F. Supp. 606.

JURISDICTION

The court of appeals entered its judgment on October 4, 1994. J.A. 78. The petition for a writ of certiorari in *Bailey* was filed on December 28, 1994. The petition for a writ of certiorari in *Robinson* was filed on December 29, 1994. On April 17, 1995, this Court granted both petitions along with petitioners' motions to proceed *in forma pauperis*, and consolidated the cases. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Pertinent provisions of 18 U.S.C. § 924 are reproduced in an appendix to this brief.

STATEMENT

In separate trials growing out of unrelated incidents, petitioners Roland J. Bailey and Candisha S. Robinson were each convicted of, among other things, using or carrying a firearm "during and in relation to" the crime of possession of cocaine with intent to distribute it, in violation of 18 U.S.C. § 924(c)(1). Separate panels of the D.C. Circuit affirmed Bailey's conviction and reversed Robinson's. The court granted rehearing en banc in both cases and, in a closely divided decision, affirmed both convictions.

1. *Bailey's Arrest, Trial, and Panel Appeal*. a. We describe the evidence in the light most favorable to the government. On the morning of May 2, 1988, two police officers patrolling in Washington, D.C., stopped petitioner Bailey when they noticed that the car he was driving had no front license plate and no inspection sticker. J.A. 18. Officer Washington asked Bailey for his driver's license. When Bailey handed him a District of Columbia identifi-

cation card instead, Washington ordered Bailey to get out of the car. J.A. 10. As Bailey stepped out of the car, Officer Washington saw him push something between the front seat and the console separating the two front seats. J.A. 3, 18, 80. Washington then searched the passenger compartment of the car and discovered one round of .380-caliber ammunition on the console and a satchel containing 30 grams of cocaine in 27 plastic bags. J.A. 18, 80; 2/27/90 Tr. 74-75, 93, 106, 125.

After arresting Bailey, the officers unlocked the car trunk (which was inaccessible from the passenger compartment) and found a vest containing $2500 in cash. 2/27/90 Tr. 97-98, 117.[1] The police also found, beneath "a whole lot of items" including "clothing and bags and other things," a bag containing a 9-mm. handgun that was "loaded with one clip" of ammunition containing six .380-caliber bullets. J.A. 6, 9; 2/27/90 Tr. 106. The police could not see the gun when they opened the trunk; indeed, the trunk was so full that it took roughly one minute to find the bag containing the gun. J.A. 9. Both officers testified that they did not see Bailey do anything other than drive the car. J.A. 5, 8.

The government indicted Bailey for (1) possession of cocaine with intent to distribute it, in violation of 21 U.S.C. § 841(a); (2) using or carrying a firearm during and in relation to that drug-trafficking crime, in violation of 18 U.S.C. § 924(c)(1); and (3) illegal possession of a firearm, in violation of 18 U.S.C. § 922(g). J.A. 17; 2/27/90 Tr. 5; C.A. App. Tab C. At trial, the government presented evidence that Bailey had recently purchased the car he was driving. 2/28/90 Tr. 7-11. The evidence also showed that the pistol recovered from the trunk of the car, though loaded with a clip of ammunition, was not ready to fire because a bullet had not yet been chambered. 2/27/90 Tr. 106, 132-136. In addition, the government's weapons expert testified that, because the clip in the gun contained .380 ammunition instead of the larger 9-mm. ammunition it was designed to hold, the weapon could be fired only once; "you cannot fire another round unless you manually remove empty rounds" and then "feed another round into the chamber." *Id.* at 139-140.

[1] The court below twice misstated the record in declaring that the trunk contained $3216. J.A. 18, 80. In fact, the record establishes that the police found a *total* of $3216, only about $2500 of which was in the trunk; the remaining $700 was on Bailey's person. 2/27/90 Tr. 97.

Another government expert, Detective DiDomenico, testified that the quantity of cocaine in Bailey's car indicated that it was intended for street sale, and that drug dealers frequently have a firearm "on their person or within reach" (J.A. 11) to protect themselves and "their assets, drugs and money" (J.A. 10, 81). DiDomenico testified further that the purpose of having a firearm within reach was for protection against "stickup boys" who try to steal the drugs or money. J.A. 11-13. He agreed that, "[i]f you are trying to protect yourself" in this way, the weapon's "power and speed" are "what's most important." J.A. 13. DiDomenico also emphasized that a drug seller would need immediate access to his firearm because he would get no notice before a "stickup boy" confronted him:

> Q. (by defense counsel): In all your experience talking with the stickup boys, did any of them ever tell you that they ever gave the person they were sticking up an opportunity to go get their gun first?
>
> A. (DiDomenico): That's ridiculous, no.

J.A. 13. The jury found Bailey guilty on all counts, and he was sentenced to concurrent 51-month terms on the counts not at issue here, a consecutive 60-month term on the Section 924(c)(1) conviction, and three years of supervised release. J.A. 19; 6/8/90 Tr. 35. The district court denied mid-trial and post-trial motions for a judgment of acquittal. 2/28/90 Tr. 13-18; 3/1/90 Tr. 7.

b. A panel of the court of appeals affirmed. J.A. 17-32. The court rejected Bailey's claim that there was insufficient evidence from which the jury could find beyond a reasonable doubt that he "used" the gun locked in the trunk of the car "during and in relation to" the underlying drug-trafficking offense of possession of cocaine with intent to distribute it. The majority stated that the government "need not establish that the defendant brandished or discharged the weapon"; it is enough to demonstrate "that the firearm was available to provide protection to the defendant." J.A. 21, 22 (internal quotations omitted). Acknowledging that "the gun here was not within Bailey's reach while he was driving," the court nonetheless concluded that the jury "could reasonably infer

* * * that the weapon located in the trunk was used to facilitate the defendant's [past] sales of narcotics and the possession of all of the drugs that necessarily preceded those transactions." J.A. 24-25.

The majority rejected Bailey's argument that his conviction should be reversed on the strength of *United States* v. *Derr*, 990 F.2d 1330 (D.C. Cir. 1993), and *United States* v. *Bruce*, 939 F.2d 1053 (D.C. Cir. 1991). J.A. 26-27. In both those cases, guns were found in close proximity to drugs, but the court held that the evidence, though possibly sufficient to show that the defendant intended to use the gun in some future act of distribution, was insufficient to demonstrate use during and in relation to the predicate offense of possession with intent to distribute. The majority distinguished these cases on the ground that they involved *future distributions*, whereas in Bailey's case the jury could reasonably have concluded (despite the absence of either a charge or evidence of actual past drug transactions) that he used the gun to protect "an earlier distribution" and the "earlier possession" that necessarily accompanied it. J.A. 26-27.

Judge D.H. Ginsburg dissented from the majority's resolution of the "use or carry" issue, opining that its holding could not "honestly be reconciled" with *Derr* and *Bruce*. J.A. 29. "I for one cannot imagine," he stated, "how a gun in a locked car trunk could have been used to protect the possession of the 27 bags in the front seat – if one accepts the premise that the guns in *Derr* and *Bruce* could not protect the drugs with which they were closeted." J.A. 31. Judge Ginsburg also made it clear, however, that he believed the rule of *Derr* and *Bruce* to be unsound. J.A. 29, 32.

2. *Robinson's Arrest, Trial, and Panel Appeal.* a. On July 15, 1991, undercover officer Larry Hale approached Veloria Robinson, petitioner's sister, in the northeast quadrant of Washington and indicated that he wished to buy crack cocaine. J.A. 48; 10/30/91 Tr. 4-5. Veloria Robinson took him to an apartment and knocked on the door. J.A. 48, 81. Hale testified that petitioner answered the door, and Veloria Robinson told her that Hale wanted something. J.A. 48, 81. Petitioner asked him what he wanted, and Hale replied, a "twenty." J.A. 48, 81; 10/30/91 Tr. 7. Hale testified that he then entered the apartment, where he observed petitioner, in the apartment's only bedroom, hand her sister a rock

of crack cocaine. J.A. 48, 81. Veloria Robinson emerged from the bedroom and gave the cocaine rock to Hale in exchange for $20 in marked money. J.A. 48, 81.

On the next evening, July 16, Hale was climbing the stairs leading to the apartment when he was approached by a man named Kwarme Parker, who said that Veloria Robinson was inside the apartment, but that he also lived in the apartment and could serve him. J.A. 48, 81. While Hale waited in the hallway outside the front door, Parker entered the apartment, reemerged, and gave Hale cocaine in exchange for $20 in marked money. J.A. 48-49.

Approximately thirty minutes later, a warrant-authorized search of the apartment led to the discovery in the bedroom closet of a locked footlocker, which contained an operable but unloaded .22-caliber Derringer in a holster, two rocks of crack cocaine weighing a total of 10.88 grams, $20 in marked money from the sale by Parker, $42.80 in other cash, and papers bearing petitioner's name. J.A. 49, 55, 81, 106; 10/30/91 Tr. 28, 36-39, 43-44, 52-57, 59, 69. The police also recovered from the apartment a cassette tape package that contained empty ziplock bags. J.A. 49, 63, 81. There was no ammunition in the apartment. J.A. 55.

Petitioner Robinson was indicted on six counts, including possession of five or more grams of cocaine base on July 16, 1991, with intent to distribute it, in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(B)(iii), and 18 U.S.C. § 2 (Count III); possession of five or more grams of cocaine base within 1000 feet of a public school on July 16, 1991, with intent to distribute it, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 860(a), and 18 U.S.C. § 2 (Count IV); and using or carrying a firearm on July 16, 1991, in the course of the offense charged in Counts III and IV and in violation of 18 U.S.C. § 924(c)(1), 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 860(a), and 18 U.S.C. § 2 (Count V). J.A. 38 n.1.[2] Consistent with the indictment, the jury instruction relating

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[2] The remaining counts were distributing crack cocaine on July 15, 1991, in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(C) and 18 U.S.C. § 2 (Count I); distributing crack cocaine within 1000 feet of a public school on July 15, 1991, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 860(a), and 18 U.S.C. § 2 (Count II); and knowingly

to the Section 924(c)(1) count required a finding that a firearm was used or carried during the *July 16* predicate offenses (Counts III and IV). J.A. 35-36.

A government expert testified that the .22-caliber Derringer was a "second gun" – the type of weapon a drug dealer would "keep hidden on [her] person and use it until [she] get[s] [her] real gun." 10/30/91 Tr. 79; J.A. 49. He also testified that drug dealers generally use guns to protect themselves from robbers, rival dealers, employees, and the police. J.A. 49; 10/30/91 Tr. 77-78.

Petitioner testified that she rented the apartment and received rent contributions from her sister, Kwarme Parker, and Sharine McKinney. J.A. 50; 10/30/91 Tr. 135-136; 10/31/91 Tr. 147-149, 153. She testified that the footlocker belonged to her but that she had no knowledge of the gun or drugs found in it. J.A. 50; 10/30/91 Tr. 133, 136; 10/31/91 Tr. 152-153. She explained that she had taken in Parker, who was dating her sister Veloria, even though she knew he was selling drugs (but not out of her apartment), because he had no place to go and because she needed help with the rent. Petitioner's testimony, corroborated in part by other witnesses (J.A. 50; 10/30/91 Tr. 104, 113-120), was that she took active steps to prevent Parker from bringing drugs into her apartment. J.A. 50; 10/30/91 Tr. 131-133, 135; 10/31/91 Tr. 151-152. Petitioner also testified that she had allowed Parker to place a padlock on the footlocker because he complained that someone was stealing money from him, that Parker had the keys to the footlocker, and that she checked the footlocker frequently to be sure it contained no drugs. 10/30/91 Tr. 133-136; 10/31/91 Tr. 149-152; see also 10/30/91 Tr. 110 (testimony of Sharine McKinney) (Parker "was the only one with the key, period"). Petitioner also offered an alibi for July 15 and read from the transcript of her sister's plea hearing, where Veloria Robinson stated that it was her girlfriend rather than petitioner who helped to sell the crack to

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making available for use a building, room, or enclosure for the purpose of using, storing, manufacturing, or distributing cocaine base on or about July 16, 1991, in violation of 21 U.S.C. § 856(a) and 18 U.S.C. § 2. J.A. 38 n.1.

Officer Hale on July 15. J.A. 50-51; 10/30/91 Tr. 129-131; 10/31/91 Tr. 144-145, 157-159.

Petitioner was convicted on all six counts. The district court denied her mid- and post-trial motions for a judgment of acquittal. 2/28/90 Tr. 174; J.A. 38-46. She was sentenced to 157 months of imprisonment, a four-year term of supervised release, and a special assessment of $300. J.A. 82.

b. A panel of the D.C. Circuit reversed Robinson's Section 924(c) conviction. J.A. 47-76. The court first observed that Section 924(c), by its terms, "conspicuously fails to criminalize mere possession of a firearm during and in relation to a drug trafficking offense." J.A. 53. Under the statute's language, moreover, "even if an individual *intends to use* a firearm in connection with a drug trafficking offense, the conduct of that individual is not reached by the statute unless the individual *actually uses* the firearm for that purpose." J.A. 53. (emphasis added). Applying the multi-factor test then used by the D.C. Circuit to determine "use," the court reversed Robinson's conviction because "there is absolutely no evidence that Ms. Robinson has ever brandished or previously used the firearm in the locked trunk"; the gun "certainly was not easily accessible since it was in the bedroom closet in a locked footlocker"; the gun was a "small derringer," was the only gun on the premises, and was "unloaded * * * without ammunition anywhere on the premises"; and "[e]ven the government's drug expert, Officer Stroud, confessed to the jury that the derringer recovered from the locked footlocker was not the type of gun a drug dealer ordinarily would use to protect a stash of drugs." J.A. 54-55.

The court also rejected the government's argument that the gun was used by petitioner "to protect her stash of drugs in the locked trunk," explaining that it was difficult to see how the gun could be "of any help to Ms. Robinson in the event of an emergency": "In order to brandish the gun, Ms. Robinson would have to run to the closet, unlock the trunk, open the trunk and grab the gun," and even then "the gun would be of virtually no use to Ms. Robinson since it was unloaded and there was no ammunition for it anywhere in the apartment." J.A. 54-55. And the court rejected the government's alternative argument that the jury could reasonably have inferred actual use of the firearm because

petitioner's apartment was a "crack house." J.A. 56-57. Judge Henderson dissented. J.A. 61-76.

3. *The En Banc Court's Opinion*. On rehearing en banc, a divided court upheld both convictions. J.A. 78-119. The bare majority of five judges abandoned the "complex, open-ended test" previously employed to determine whether a firearm was "used" and replaced it "with a test that looks to two factors only": the proximity of the gun "to the drugs, drug paraphernalia, or drug proceeds" involved in the underlying offense; and "the accessibility of the gun to the defendant from the place where the drugs, drug paraphernalia, or drug proceeds are located." J.A. 80, 101.

The majority acknowledged that, in both of petitioners' cases, the predicate offense for the § 924(c)(1) count was possession of cocaine with intent to distribute it. J.A. 80. The court criticized its own prior approach and concluded that other circuits "focus[ ], in essence, upon whether the firearm was accessible and proximate to the defendant during the commission of the drug offense." J.A. 83-92. As to Section 924(c)(1)'s requirements that a firearm be "used" and that such use occur "during" as well as "in relation to" the predicate offense, the court first acknowledged that the statute does not criminalize "the mere possession of a firearm by someone who commits a drug offense." J.A. 82, 93-100. "[U]se," the court noted, "could be defined either narrowly, so as to encompass only the paradigmatic uses of a gun, i.e., firing, brandishing, or displaying the gun during the commission of the predicate offense, or more broadly, so as to include the other ways in which a gun can be used to facilitate drug trafficking." J.A. 93.

The court acknowledged that the former approach has "the virtue of simplicity" and would make it "relatively easy to determine" liability. Without even acknowledging the rule of lenity, however, the court rejected the "paradigmatic" approach because "nothing in the statute indicates that the Congress intended" it and because "use" is an "expansive[ ]" term that does not require active employment of a gun. J.A. 93 (citing *Smith* v. *United States*, 113 S. Ct. 2050, 2054, 2058 (1993)). Accordingly, the court concluded that one "uses" a gun within the meaning of Section 924(c)(1) by either placing or keeping the gun in a location "from which one (or one's agent) can gain access to it *if and when needed to facilitate a drug crime*." J.A. 95 (emphasis added). The

court held further that, when the predicate drug offense is a "continuing offense" such as possession with intent to distribute, the government need not show that the gun was in such a place at the time the defendant is arrested; it is enough to show that the defendant "put or kept the gun" in such a place "at some point" in time during the defendant's possession of drugs. J.A. 95.

The majority also held that a firearm is used "during and in relation to" a predicate drug offense if it is "positioned so as to be available for use during ongoing drug activity." J.A. 96. The court stressed that the gun did not have to "further[ ]" the drug offense, provided that its location suggests that it had the *potential* to facilitate the drug offense. J.A. 95.[3] The majority opinion made no attempt to define the "carry" component of Section 924(c)(1) or to delimit the scope of "use" *vis-à-vis* "carry."

Applying those standards, the court concluded that the government had submitted sufficient evidence to convict both Bailey and Robinson. J.A. 100-101. The court held that the gun in the locked trunk of Bailey's car was "used" because it was "found in the same place as the cash (namely, the trunk) and in the same car as the drugs" and was "easily accessible to Bailey at any time that he was handling either the drugs or the proceeds of the sale." J.A. 100. As for Robinson, the court similarly concluded that the Derringer found in the locked trunk in her apartment was "proximate to the drugs, and it was accessible to anyone, such as Robinson, who had access to the drugs." J.A. 101.

Judge Wald dissented in part. J.A. 102-106. She stated that the majority's twofold standard for determining whether a firearm

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[3] In reaching this conclusion, the court cited several cases broadly interpreting the phrase "relates to" in 29 U.S.C. § 1144(a), the preemption clause of the Employment Retirement Income Security Act (ERISA), and concluded that Congress's choice of the phrase "in relation to" was "clearly deliberate and an indication that it intended § 924(c)(1) to be a broad prohibition, reaching more than conduct that actively advances the underlying predicate drug offense." J.A. 97. In addition, the court relied on Congress's failure in 1985 to enact a bill that would have replaced – in the "carrying" but not the "use" prong of Section 924(c)(1) – the "in relation to" requirement with a more restrictive "in furtherance of" requirement. J.A. 97-98.

was "used" "artificially limit[s]" the factors necessary to distinguish "use" from mere possession. J.A. 103; see also J.A. 102 ("Congress * * * created no statutory presumption that 'use' automatically would follow from the presence of any particular factors, and I can find no authority for courts to do so."). Judge Wald identified several additional factors, such as the type of gun involved, whether the gun was loaded, and whether expert testimony supported an inference of "use," that in her view are crucial to distinguishing "use" from mere possession. J.A. 102. She also criticized the majority's test as unclear and the two factors as collapsing into one. J.A. 103 ("It seems that whenever the guns are located proximately to the drugs, they must also be potentially accessible to the defendant *from the place the drugs are stored*."). Despite her staunch disagreement with the legal standard adopted by the majority, Judge Wald – alone among the nine participating judges of the court of appeals – concluded that, through the application of a traditional balancing of the appropriate factors, Bailey's conviction should be affirmed and Robinson's reversed. J.A. 106.

Judge Williams, joined by Judges Silberman and Buckley, dissented outright. J.A. 107-119. Judge Williams faulted the majority's reliance on inferences of *potential* use, arguing that, under the plain meaning of the statutory term, "use" "normally implies activity." J.A. 108 (citing *United States* v. *McFadden*, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, C.J., dissenting)). The three-judge dissent rejected the majority's reliance on *Smith* v. *United States* to extend "use" to encompass potential use (J.A. 115-116):

> Nothing in *Smith* precludes limiting "use" to active employment. [*Smith*'s] statement that "§ 924(c)(1)'s language sweeps broadly", * * * 113 S.Ct. at 2054, means only that the proscribed use of firearms is not limited to the obvious or typical ways in which they may assist in the commission of a crime. Rather, a gun may be "used" regardless of whether it acts as an instrument to shoot, to bludgeon, or for exchange. That is, whether a firearm is "used" does not depend on whether it is employed in the customary way or a more creative way. But it does depend on whether the gun is employed at all, and nothing [in *Smith*] expands "use" beyond active employment.

Judge Williams also noted that Section 924 itself distinguishes the actual use of a firearm, on the one hand, from intent or potential for use, on the other. J.A. 112 (citing 18 U.S.C. § 924(d)). Quoting this Court's observation in *Smith*, 113 S. Ct. at 2057, that "using a firearm" should not have a "different meaning in § 924(c)(1) than it does in § 924(d)," Judge Williams concluded that the majority opinion was inconsistent with Congress's choice not to reach mere "intent to use" in subsection (c). J.A. 112.

Judge Williams also examined the origins of Section 924(c)(1) and the legislative materials accompanying Congress's revisions of the statute in 1984 and 1986, which he concluded confirm that "use" was intended to reach only active employment of a firearm. J.A. 109-112. And Judge Williams criticized the majority's definition of "use" as being so broad that it "leave[s] no apparent role" for the alternate element of "carrying" a firearm during and in relation to a predicate offense. J.A. 112. Judge Silberman joined Judge Williams's dissent and also dissented separately. J.A. 119.

SUMMARY OF ARGUMENT

Section 924(c)(1) imposes mandatory, consecutive sentences (of at least five years and of up to life imprisonment) on any person who "uses or carries" a firearm "during and in relation to" a crime of violence or a drug-trafficking offense. In these cases, the Court is called on to decide what category of conduct Congress singled out for this especially severe sanction and, conversely, what conduct with respect to firearms Congress intended to treat differently by punishing through the process of sentencing for the underlying drug-trafficking offense.

I. "Use" under Section 924(c) means the active employment of a firearm to carry out the predicate offense. Such active (as opposed to passive or potential) employment includes firing, discharging, aiming, pointing, bludgeoning, trading, threatening with or brandishing, or displaying. It may also include referring to the gun if such action assists in the accomplishment of the predicate offense. "Use" normally requires that the defendant handle the firearm or be aware of use of the weapon by others involved in the predicate offense. This definition, we submit, is consistent with the ordinary meaning of the word "use" as suggesting some kind of *activity*, see *United States* v. *McFadden*,

13 F.3d 463, 467 (1st Cir. 1994) (Breyer, C.J., dissenting), and is rooted in the text, structure, and legislative history of the statute. At a minimum, this reading is dictated by the rule of lenity, because no other plausible interpretation is "unambiguously correct." *United States* v. *Granderson*, 114 S. Ct. 1259, 1267 (1994).

II. If the Court rejects this definition, it would then be required to draw a line somewhere else along the continuum between actual employment of the firearm to carry out the predicate offense and mere possession, which even the majority below acknowledged the statute does not reach. The Court should reject the D.C. Circuit's "proximity and accessibility" standard because it in fact criminalizes instances of mere possession; contravenes other limits on "use" liability apparent from the text, structure, and legislative history of the statute; and unduly limits the ability of juries and courts to consider all relevant factors in deciding whether a firearm was "used" as opposed to merely possessed. The Court should take this occasion to articulate several clear limits on "use" liability and should endorse an approach to determining "use" within those limits that at least takes into account all pertinent factors.

ARGUMENT

Two years ago, in *Smith* v. *United States*, 113 S. Ct. 2050, 2058 (1993), the Court held that a defendant who attempted to obtain a large quantity of cocaine from a pawnshop owner by displaying and offering to trade a machine gun for the drugs was properly convicted of "using" that firearm "during and in relation to" the predicate offenses of attempt (and conspiracy) to possess cocaine with intent to distribute it. The Court rejected the narrower interpretation that the statute requires "use as a weapon" and determined that a firearm is "used" if a defendant "employ[s]" or "derive[s] service from" the firearm. Although the Court noted that the definition of "use" is "expansive[ ]" (*id.* at 2058), it nevertheless cautioned that the term is "not without limits." *Id.* at 2054 (citing *United States* v. *Long*, 905 F.2d 1572, 1576-1577 (D.C. Cir.) (Thomas, J.), cert. denied, 498 U.S. 948 (1990)). The present cases afford the Court an opportunity to give meaning to the limits that circumscribe Section 924(c)(1)'s scope and halt the lower courts' continuing efforts to rewrite the statute by

allowing juries to equate "use" with mere "possession" of a firearm – and constructive rather than actual possession, at that.

I. A DEFENDANT "USES" A FIREARM "DURING AND IN RELATION TO" A DRUG-TRAFFICKING OFFENSE BY ACTIVELY EMPLOYING THE WEAPON TO CARRY OUT THE PREDICATE OFFENSE

The ordinary meaning of Section 924(c)(1)'s operative language and the language and structure of Section 924 as a whole show that Congress intended to impose mandatory sentences only on those who actively employ a firearm to carry out the predicate offense. Such active employment includes firing or discharging, aiming, pointing, bludgeoning, trading, threatening with, brandishing, or displaying. It can also include referring to the weapon. To the extent there is any ambiguity about the meaning of the statute, it is completely dispelled by the legislative history of Section 924(c)(1). Because there is no evidence that Bailey or Robinson ever "used" a firearm within the meaning of Section 924(c)(1), their convictions should be reversed. Even if other constructions of the term "use" are possible, the rule of lenity calls for this reading.

A. The Language And Structure Of Section 924(c)(1) Clearly Express Congress's Intent To Criminalize Only Active Employment Of A Firearm To Commit The Predicate Offense

As this Court often has explained, "[t]he task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). Section 924(c)(1) provides in pertinent part:

> Whoever, *during and in relation to* any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed *by the use of* a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, *uses or carries* a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years * * *.

18 U.S.C. § 924(c)(1) (emphasis added). The five-year term of imprisonment under Section 924(c)(1) for a first use of a firearm may not be suspended and must run consecutively with "any other term of imprisonment including that imposed" for the predicate offense. *Ibid.* The government must make two distinct showings to obtain a conviction under Section 924(c)(1): that the defendant "used" or "carried" a firearm; and that such use or carrying was both "during *and* in relation to" a "crime of violence or drug trafficking crime." *Smith*, 113 S. Ct. at 2053 (emphasis added).

In *Smith*, the Court considered the meaning of these requirements. The defendant met with an undercover agent and sought to exchange a machine gun for cocaine. In concluding that the defendant "used" the machine gun, the majority relied on the ordinary meaning of the word "use," the surrounding language in Section 924(c)(1), and the language and structure of Section 924 as a whole. 113 S. Ct. at 2053-2058. With regard to the independent requirement that the use be contemporaneous with ("during") and "in relation to" the predicate offense, the Court observed that this phrase is "expansive" and, "at a minimum, clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime." *Id.* at 2058-2059. The Court concluded, however, that it "need not determine the precise contours" of this requirement because "petitioner's use of his MAC-10 meets any reasonable construction of it": the gun "was an integral part of the transaction"; "[w]ithout it, the deal would not have been possible." *Id.* at 2059 (internal quotations omitted).

Properly interpreted, the operative language of Section 924(c) at issue in this case – whether petitioners "used" the firearms in question "during and in relation to" the predicate offenses – denotes the active employment of the weapon to accomplish the unlawful acts that constitute the predicate offense. As this Court explained in *Smith*, the word "use" is nowhere defined in Section 924 and thus must be construed in accord with its ordinary and natural meaning. 113 S. Ct. at 2054 (citing *Perrin* v. *United States*, 444 U.S. 37, 42 (1979)). In ordinary usage, the word "use" connotes action or activity. See *United States* v. *Long*, 905 F.2d 1572, 1576 (D.C. Cir.) (Thomas, J.) (acknowledging word's "conventional, active connotation"), cert. denied, 498 U.S. 948 (1990); *United States* v. *McFadden*, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, C.J., dissenting) ("the ordinary meanings of the words 'use' and 'carry' * * * connote activity beyond simple possession"); *id.* at 468 ("[c]ourts might have interpreted 'use' by insisting upon *activity* with the gun, such as firing it or brandishing it, or, at least, displaying it [ ]or even trading it for drugs"). In consulting various dictionaries to discern that meaning, the Court in *Smith* noted that "use" is variously defined as "'to convert to one's service' or 'to employ'" (113 S. Ct. at 2054, quoting *Webster's New International Dictionary of English Language* 2806 (2d ed. 1949)), or "'[t]o make use of; to convert to one's service; to employ; to avail oneself of; to utilize; [or] to carry out a purpose or action by means of'" (*ibid.*, quoting *Black's Law Dictionary* 1541 (6th ed. 1990)). All of these definitions suggest action or activity.

Of course, the word "use" cannot be "viewed in isolation" but rather must be interpreted "in light of the terms that surround it." *Smith*, 113 S. Ct. at 2054-2055. The surrounding language includes a second appearance in the very same sentence containing the operative language: after describing the eligible predicate offenses as "any crime of violence or drug trafficking crime," the statute clarifies that this "includ[es] a crime of violence or drug trafficking crime which provides for an enhanced punishment if *committed by the use of* a deadly or dangerous weapon or device." 18 U.S.C. § 924(c)(1) (emphasis added). In this second appearance, the word "use" conveys the unmistakable suggestion of active employment to carry out the underlying offense. See also pp. 19-21, *infra*; J.A. 109-112 (Williams, J., dissenting).[4]

The pertinent context also necessarily includes the word's exclusive direct object ("a firearm"), since firearms are capable of being used in only so many ways; its companion term ("carries"), which suggests the kind of conduct Congress intended to crimina-

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[4] The en banc majority relied heavily on *Astor* v. *Merritt*, 111 U.S. 202 (1884), a century-old case involving "use" of wearing apparel under the customs laws that was cited in passing in *Smith* (see 113 S. Ct. at 2054) for the proposition that a "more inclusive understanding of 'use' has long been recognized in the jurisprudence of the Supreme Court." J.A. 94. That case, however, has little or no relevance to the issue presented here. See J.A. 108-109 (Williams, J., dissenting).

lize and must have some meaning independent of "use"; and the requirement that any "use" or "carrying" of a firearm bear a certain temporal and functional relationship ("during and in relation") to a specific predicate offense. Of particular significance is the term "carry," which specifies an alternative basis for liability. The plain meaning of the word "carry" is "[t]o have or keep on one's person (*carry a gun*)." *Webster's II New Riverside University Dictionary* 233 (1988) (emphasis altered).[5]

Any definition of "use" that renders superfluous the alternative element of "carrying" a firearm is inconsistent with the tenet that each word in a statute must be given effect. *United States Department of Treasury* v. *Fabe*, 113 S. Ct. 2202, 2210 n.6 (1993); see also *Ratzlaf* v. *United States*, 114 S. Ct. 655, 659 (1994) (concern over treating statutory terms as surplusage is "heightened when the words describe an element of a criminal offense"). Defining "use" as active employment of a firearm to commit the predicate offense preserves a meaningful role for "carrying" liability: one can "use" a firearm without carrying it (as by displaying or referring to a firearm not borne on one's person, or by trading a firearm for drugs without handling it). Although many instances of use will also involve carrying, the same is true of the D.C. Circuit's "proximity and accessibility" test for use. See J.A. 119 (Williams, J., dissenting) (majority's

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[5] Under a somewhat broader definition in *Webster's*, "carry" incorporates an element of movement together with an element of immediate accessibility. Thus, "carry" can mean "[t]o bear [an object] from one place to another" while "hold[ing] or be[ing] capable of holding" the object. *Webster's II New Riverside University Dictionary* 233 (1988). See also *The New Shorter Oxford English Dictionary* 343 (1993) (defining "carry" to include an element of movement as well as "hav[ing] [the object] with or beside one as one moves"). There is no basis on which a jury could properly have concluded that either Bailey or Robinson "carried" a firearm during and in relation to the predicate offense of possession of a controlled substance with intent to distribute it. Not a single member of the en banc court suggested otherwise, and Judge Williams's dissent explained in detail why Bailey's action in "transporting" a gun in the trunk of his car did not qualify as "carrying." J.A. 117-119.

"expansive view of 'use' virtually emasculates the role of the term 'carry' in the statute").

Any definition of "use" should also bear some logical relationship to "carry," so that it is possible to see why Congress would have singled out those two kinds of activity for stiff mandatory penalties (rather than letting the conduct be punished through a two-level enhancement under the Sentencing Guidelines).[6] The D.C. Circuit majority failed to consider the relationship between "use" and "carry," and it is difficult to imagine why Congress would have singled out for punishment situations where a defendant, during the predicate offense, either (1) bears a firearm on his person (or moves in tandem with the firearm in circumstances where the firearm is within easy reach); or, according to the D.C. Circuit's test, (2) constructively possesses a firearm that is situated near the drugs, drug paraphernalia, or drug proceeds involved in the underlying offense and is accessible *from that location* (regardless of whether it is accessible to the defendant). J.A. 80, 101. In contrast, the definition of "use" we propose preserves a logical relationship between the two bases of liability. It is perfectly sensible that Congress wanted to criminalize not only instances where a firearm is actively employed in the commission of a crime of violence or drug-trafficking offense, but also cases where a firearm is "carrie[d]" "in relation to" the predicate offense (*i.e.*, carried with the intent to use it should the need arise).

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[6] Under Section 2D1.1(b)(1) of the Sentencing Guidelines, a two-level enhancement is applied to anyone convicted of certain drug-trafficking offenses (including possession with intent to distribute) if "a dangerous weapon (including a firearm) was possessed" during the offense. The Guidelines' two-level enhancement for "possession" is a more calibrated means of punishment than the blunt mandatory minimum punishment of Section 924(c), because the enhancement is added to a number that already reflects the seriousness of the crime in light of such factors as the amount of drugs involved in the predicate offense and the criminal history of the specific offender. See, *e.g.*, U.S.S.G. §§ 2D1.1(a)(3), 2D1.1(c); *McFadden*, 13 F.3d at 467-468 (Breyer, C.J., dissenting). The two-level enhancement does not apply if the defendant is also convicted under Section 924(c). See U.S.S.G. § 2K2.4 application note 2, § 3D1.1 application note 1.

What is more, our proposed definition of "use" uniquely preserves the proper *relationship* between "use" and "carrying" liability. As Judge Williams correctly noted, Congress "saw 'use' as a *comparatively narrow* term, with 'carry' picking up cases of an alternative type of activity, where the defendant did not actively 'use' the weapon." J.A. 112 (emphasis added). This reading finds ample support in the legislative history of Section 924(c).[7]

Indeed, the Solicitor General has previously acknowledged this relationship between the "use" and "carry" elements in Section 924(c). In *McLaughlin* v. *United States*, 476 U.S. 16 (1986), a case holding that an unloaded firearm could be a "dangerous weapon" under 18 U.S.C. § 2113(d), the Solicitor General's brief took note of the 1984 amendments to Section 924(c) and stated: "It appears that Congress is of the view that *something more than the carrying of a gun* is required to establish its use." U.S. Br. 19 n.18 (No. 85-5189) (emphasis added). The Solicitor General further explained that Section 2113(d), which imposes additional penalties for bank robbery committed "by the use of a dangerous weapon or device," would not cover an armed robber who "approaches a bank teller and demands money, without displaying a weapon," because "the robber has not 'used' the weapon to 'assault' anyone, as Section 2113(d) requires." *Id.* at 18-19. See also J.A. 113-115 (dissenting opinion) (discussing *McLaughlin* brief).

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[7] See H.R. Rep. No. 495, 99th Cong., 2d Sess. 10, *reprinted in* 1986 U.S.C.C.A.N. 1327, 1336 (expressing concern that a "self-defense" exception might "decimate[ ]" the "'carrying' branch of the offense * * * in that the felon could claim that he was only carrying the weapon for defense against other felons, and cite the fact that he did not actually *use* the weapon as proof of his claim"); S. Rep. No. 225, 98th Cong., 2d Sess. 314 n.10 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3492 n.10 ("Evidence that the defendant had a gun in his pocket but did not display it, or refer to it, could nevertheless support a conviction for 'carrying' a firearm in relation to the crime if from the circumstances or otherwise it could be found that the defendant *intended to use* the gun if a contingency arose or to make his escape.") (emphasis added); 114 Cong. Rec. 27,144 (1968) (Sen. Murphy) (praising an amendment on ground that it "will make every criminal and would-be criminal think twice before using *or even carrying* a firearm") (emphasis added).

Finally, a proper understanding of "use" must account for the requirement that the firearm use occur "during and in relation to" the predicate offense – here, possession of a controlled substance with intent to distribute it. The word "during" suggests that "use" signifies something whose time of occurrence can be identified and proved.[8] *Active* employment fits that description; the D.C. Circuit's proximity and accessibility tests do not.

B. The Structure Of Section 924 As A Whole Confirms This Interpretation

"[T]he meaning of statutory language, plain or not, depends on context." *King* v. *St. Vincent's Hospital*, 502 U.S. 215, 221 (1991). Each term in a statute should be read in light of the surrounding provisions of the law as a whole. *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 114 S. Ct. 517, 523 (1993). Although Congress's intent not to penalize anything less than the active employment of a firearm to accomplish the predicate offense is discernible from the language and structure of Section 924(c)(1), "[t]o the extent there is any uncertainty" on this score, "the remainder of § 924 appropriately sets it to rest." *Smith*, 113 S. Ct. at 2056.

In *Smith*, this Court relied on Section 924(d)(1), which authorizes the forfeiture of firearms and ammunition that are "involved in or used in" certain offenses and "intended to be used" in other offenses. 18 U.S.C. § 924(d)(1); see also *id.*

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[8] To the extent that firearm "uses" are not limited to discrete events (such as an instance of firing, brandishing, pointing, or trading of the weapon), additional problems may arise in the administration of the statute. See *United States* v. *Anderson*, 39 F.3d 331, 360 (D.C. Cir. 1994) (Silberman, J., dissenting) (noting that under majority's holding – that each "use" of a firearm during and in relation to the predicate offense is a separate violation of Section 924(c) – "if a defendant were charged with possession of drugs with intent to distribute and kept a gun in a chest, each time he indulged the impulse to fondle the gun so as to embolden his criminal determination, *see United States v. Bailey*, 36 F.3d 106, 114, 116 * * *, he would have committed a fresh section 924(c)(1) violation * * * [and] it would not be unusual for the government to obtain, as a practical matter, a life sentence whenever a gun accompanies a drug crime"), rehearing en banc granted, 39 F.3d 331, 361 (1995).

§ 924(d)(2)(C) (same). Because some of the listed offenses include use of a weapon as an item of barter, the Court reasoned, Congress must have intended the word "use" to include trading a weapon for drugs. 113 S. Ct. at 2056-2057. Here, by contrast, there is not the slightest indication in Section 924(d) that Congress envisioned as "use" passive relationships such as those involved in these cases. On the contrary, Section 924(d) squarely supports our definition of "use." As explained above, the forfeiture provision makes express reference to firearms that are "used in" or "involved in" any knowing commission of certain offenses, as well as to firearms that are merely "intended to be used in" other offenses. This demonstrates Congress's acute awareness of the distinction between actual use and potential or intended use.[9] If Congress had meant Section 924(c) liability to attach whenever a firearm was "involved in" a predicate offense or a defendant "intended to use" a firearm during that offense, Congress could have said as much. See J.A. 112 (Williams, J., dissenting) ("Congress * * * provided for forfeiture *before* the weapon was used * * * apparently saving § 924(c)'s five years additional imprisonment for cases of actual use").

Moreover, all of the offenses cross-referenced in Section 924(d)(3) involve firearm "uses" falling squarely within the definition we propose.[10] This was not true of the definition of "use" rejected in *Smith* ("use as a weapon"): the offenses listed in Section 924(d)(3) include some "in which the firearm is *not* used as a weapon but instead as an item of barter or commerce." 113

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[9] See also 18 U.S.C. § 924(e)(2)(B) (defining "violent felony" as including acts of juvenile delinquency involving "the use or carrying of a firearm, knife, or destructive device" where the predicate offense "has as an element the *use, attempted use, or threatened use* of physical force against the person of another") (emphasis added); *id.* § 924(h) (penalizing transfers of certain firearms that "will be used" to commit drug-trafficking offenses).

[10] As Judge Williams's dissent observes, the parallelism between "use[s]" under Section 924(c) and "inten[ded] * * * use[s]" under Section 924(d) "may not be complete" because in Section 924(c) the term shares company with "carry" whereas in the portion of 924(d) that is relevant for this analysis it does not. See J.A. 113.

S. Ct. at 2057. By contrast, in all the examples given in *Smith* – manufacturing, receiving, transferring, delivering, shipping, exporting, importing, and transporting – the firearm not only is actively employed to carry out the crime, but also is itself a necessary part of the actus reus. See *id.* at 2057 n.*; see also 18 U.S.C. §§ 922(a)(1), 922(a)(3), 922(a)(5), 922(b)(3), 922(d), 922(i), 922(j), 922(*l*), 922(n), 924(b). As this Court has ruled (*Smith*, 113 S. Ct. at 2057), "using a firearm" should not have a "different meaning in § 924(c)(1) than it does in § 924(d)."

Also instructive is Section 924(a)(5)(B)(ii), which penalizes the sale, delivery, or other transfer of a handgun or ammunition by an adult to a juvenile if the adult knows or has reasonable cause to know that the juvenile "intended to *carry or otherwise possess* or *discharge or otherwise use* the handgun or ammunition in the commission of a crime of violence." 18 U.S.C. § 924(a)(5)(B)(ii) (emphasis added). This provision reflects Congress's understanding of "carry[ing]" as a specific kind of possession (bearing on one's person), and "discharg[ing]" as a specific kind of use. It also suggests that Section 924(c), which lacks the phrase "or otherwise possess," reaches only one type of possession – carrying. Moreover, under the rules of *ejusdem generis* and *noscitur a sociis*, the phrase "discharge or otherwise use" takes on a special significance: the general term "use" that follows the specific term "discharge" must describe a category of deployments of the weapon that are similar in kind to discharging. *Cleveland* v. *United States*, 329 U.S. 14, 18 (1946). That category consists of other active employments of a firearm to carry out the predicate offense.[11]

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[11] See also H.R. Conf. Rep. No. 3355, 103d Cong., 2d Sess. 421, *reprinted in* 1994 U.S.C.C.A.N. 1839, 1858-1859 (in report accompanying Section 924(a)(5)(B)(ii), stating that "ready availability of guns to young people results in the acceptability of their *random use*") (emphasis added); 18 U.S.C. § 924(i) (imposing penalties on "[a] person who, in the course of a violation of subsection (c), causes the death of a person through the *use of a firearm*") (emphasis added).

C. The Origins And Legislative History Of Section 924(c)(1) Demonstrate Congress's Intent To Penalize Only Active Employment Of A Firearm To Commit The Predicate Offense

Because the language and structure of Section 924 demonstrate that "use" of a firearm "during and in relation to" a "crime of violence or drug trafficking crime" covers only the active employment of the weapon to accomplish the underlying offense, there is no need to consult the legislative history of the provision. If the Court concludes, however, that Section 924(c)(1)'s meaning is ambiguous, then we submit that such ambiguity is dispelled by a careful examination of the statute's origins and legislative history.

Originally enacted as part of the Gun Control Act of 1968, Section 924(c) has been amended many times. Nevertheless, only three of those amendments (in 1984, 1986, and 1988) bear on the scope of liability for "us[ing] or carry[ing]" a firearm. As we next explain, Congress intended in passing the 1968 Act to limit "use" to active employment to carry out the predicate offense; and there is nothing in the legislative record to suggest (and much that refutes) any claim that the 1984, 1986, or 1988 amendments were intended to broaden the scope of "use" liability.

1. *The Gun Control Act of 1968.* In the summer and fall of 1968, Congress, responding to a precipitous rise in political assassinations, riots, and other violent crimes involving guns, passed two laws in quick succession: the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197; and the Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1224.[12] Congress debated and passed the latter statute in the immediate aftermath of the assassinations of Senator Robert F. Kennedy and Dr. Martin Luther King, Jr. See *Busic* v. *United States*, 446 U.S. 398, 404 n.9 (1980).

Section 924(c) was directly addressed to alleviating the problem of violent crime. In pertinent part, it provided:

[12] See H.R. Rep. No. 1577, 90th Cong., 2d Sess. 7, *reprinted in* 1968 U.S.C.C.A.N. 4410, 4412-4413; S. Rep. No. 1501, 90th Cong., 2d Sess. 22-23 (1968).

> Whoever – (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States, shall be sentenced to a term of imprisonment for not less that one year nor more than 10 years.

Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1224. For several reasons, it is clear that Congress intended Section 924(c) to criminalize only the active employment of a firearm to carry out a predicate offense.

First, as Judge Williams correctly noted (J.A. 110), the statutory language strongly "suggests that Congress had active employment of a weapon in mind." Judge Williams explained:

> The phrase "uses *to commit*" implies that the defendant derived actual service from the weapon in completing an unlawful act. This service might take the form of injuring one's opposition by firing it, intimidating opponents by displaying or brandishing it, or offering it in exchange to complete an unlawful commercial transaction. It does not, however, imply merely potential service – i.e., keeping it hidden from view, intending to use it only if a contingency should arise.

J.A. 110 (dissent).

Second, the legislative history – "sparse" though it may be[13] – confirms Congress's intent to penalize only active employ-

[13] *Simpson* v. *United States*, 435 U.S. 6, 15 (1978); see *id.* at 13-14 (describing origins of provision). The "use or carry" provision originated in the House as a floor amendment proposed by Representative Poff only six weeks after Senator Kennedy's assassination. 114 Cong. Rec. 22,231 (1968); see also *id.* at 21,785-21,786. The Poff amendment, whose operative language ultimately appeared in the statute, was passed by the House (see *id.* at 22,248, 23,094) instead of an alternative amendment proposed by Representative Casey. See *id.* at 22,229, 21,765-21,766, 21,770. Representative Poff noted that his amendment "is a substitute for the Casey amendment, but it is not in derogation of the Casey amendment." *Id.* at 22,231. The House bill's provision was later adopted by a conference committee in lieu of an analogous provision of

ment of firearms to commit federal offenses. Several Members of Congress expressed the view that the statute should penalize "use" either instead of, or in addition to, "carry[ing]" of a firearm, and their remarks made clear the view that the word "use" was appropriate precisely because it was more *active* than carrying.

Representative Casey, for example, stated that, if the statute penalized "use" but not "carrying," the provision would "apply only to those who *actually use* a gun *in the commission of* the offenses enumerated." 114 Cong. Rec. 22,229-22,230 (1968) (emphasis added). In support of an amendment to delete the word "carries," Representative Dowdy stated:

> I believe that the onus should be the use of a firearm in the commission of a crime. The fact that a person might be carrying a firearm could very well not have anything to do with the commission of a crime if the gun is not used or exhibited. Of course, exhibiting would be using the gun in the commission of a crime, and that is where the burden should be on the use of a gun in the commission of a crime.

Id. at 22,235. Similarly, Representative Harsha criticized a version of the bill for "requir[ing] those merely having a gun in their possession to be subject to the same penalties as those who *actually use* that weapon in the commission of a crime." *Id.* at 22,234 (emphasis added). And Representative Dole praised another version for "materially aid[ing] police and prosecutors in obtaining convictions and prison terms for the offender who *uses a firearm in the performance of a Federal felony*." *Id.* at 22,762

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the Senate bill that had been added by Senator Dominick. See *id.* at 27,141-27,142 (1968); H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 12, 31-32, *partially reprinted in* 1968 U.S.C.C.A.N. 4410, 4426. The Casey amendment provided in pertinent part that "whoever *during the commission of* any robbery, assault, murder, rape, burglary, kidnaping, or homicide (other than involuntary manslaughter), *uses or carries* any firearm which has been transported in interstate or foreign commerce shall be imprisoned" for specified terms. 114 Cong. Rec. 22,229 (emphasis added). Senator Dominick's amendment imposed penalties on anyone who, "*while engaged in the commission* of any offense which is a crime of violence punishable under this title, *is armed with any firearm*." *Id.* at 27,142 (emphasis added).

(emphasis added); see also *ibid.* ("a deterrent to felonies *committed with a weapon*") (emphasis added).[14]

2. *The Comprehensive Crime Control Act of 1984.* In 1984, Congress amended Section 924(c)(1) to read, in pertinent part, as follows:

> Whoever, during and in relation to any crime of violence, including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence, be sentenced to imprisonment for five years.

Pub. L. No. 98-473, § 1005(a), 98 Stat. 1837, 2138-2139. Among other things, the amended statute eliminated the requirement that the firearm be carried "unlawfully," added the requirement that it be carried or used "during and in relation to" the predicate offense, and deleted the words "to commit" from the phrase "uses to commit."

As Judge Williams observed, there is "no evidence" that, in amending the statute in 1984, "Congress sought to expand the meaning of 'use.'" J.A. 111 (dissent). On the contrary, the available evidence demonstrates that Congress's *only* purposes were to address "drafting problems" and "interpretations of the section in recent Supreme Court decisions" that had "greatly reduced its

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[14] References by other Members of the House reflect a similar understanding of firearm "use." See, *e.g.*, 114 Cong. Rec. at 21,788-21,789 (Rep. Scheuer) (asking whether police officer who is convicted of assault would be subject to enhanced penalty if officer "push[ed] somebody in the street or punch[ed] somebody in the nose – with *no use of the pistol*, but merely carrying the pistol as [the officer] is licensed to do – *in no way bringing the pistol into any aggressive act*"); *id.* at 22,239 (Rep. Pucinski) (Casey amendment would, "for the first time, make a criminal who *takes a gun in his hand* realize that he is going to be prosecuted to the fullest extent of the Federal law") (emphasis added); *id.* at 22,247 (Rep. Horton) ("When a person commits a crime with a firearm, he *uses his weapon to terrorize* his victim with the threat that, with the flick of his finger, he can snuff out one or more innocent lives.") (emphasis added).

effectiveness as a deterrent to violent crime." S. Rep. No. 225, 98th Cong., 1st Sess. 312 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3490; see also *id.* at 313, 1984 U.S.C.C.A.N. at 3491 (the amendment was made "to overcome the problems with the present subsection discussed above [*i.e.*, in the report]"); J.A. 110-111 (noting significance of this language). The "drafting problems" Congress wished to correct pertained to sentencing, not the definition of the offense. S. Rep. No. 225 at 313, 1984 U.S.C.C.A.N. at 3491. And the decisions of this Court that Congress wished to undo were *Busic* v. *United States*, 446 U.S. 398 (1980), and *Simpson* v. *United States*, 435 U.S. 6 (1978). See S. Rep. No. 225 at 312-313, 1984 U.S.C.C.A.N. at 3490-3491. In view of this discussion in the Senate Report accompanying the legislation, there is no reason to believe that Congress sought to expand the definition of "use," and every reason to conclude that it did not.

In fact, most of Congress's revisions to the statute that affect liability for firearm "use" can be readily explained by Congress's goal of overturning *Simpson* and *Busic*. In *Simpson*, this Court held that a defendant may not be sentenced under both Section 924(c) and a sentence enhancement provision in the predicate offense. 435 U.S. at 16. In *Busic*, the Court held that a defendant may not be prosecuted under Section 924(c) if the predicate offense itself contains an enhancement provision. 446 U.S. at 399-400. To overturn those holdings, Congress inserted the following qualifying phrase after "crime of violence": "including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device." Apparently to avoid repeating this cumbersome phrase, Congress consolidated subsections (1) and (2) into a single section. And, once that consolidation occurred, it would of course have been ungrammatical to retain the full phrase "use to commit" in lieu of "use."[15]

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[15] This reading is confirmed by the Justice Department's analysis of S. 829, the Administration's bill that contained the provision that later became the 1984 amendment to Section 924(c). See *Comprehensive Crime Control Act of 1983: Hearings on S. 829 Before the Subcommittee on Criminal Law of the Senate Committee on the Judiciary*, 98th Cong., 1st Sess. 116, 199 & n.2 (1983) (*S. 829 Hearings*); see also 129 Cong. Rec. 22,883, 22,906 (1983). According to the Justice Department, the pertinent language originated in S. 2572, a bill that had been passed in 1982 but vetoed by President Reagan. *S. 829 Hearings* at 199.

The Senate Report did discuss, in a lengthy footnote, additional changes made by the 1984 amendment to liability for *carrying* a firearm – including omission of the requirement that the carrying be "unlawful[ ]" and addition of a requirement that it be "in relation to" the predicate offense. The Report explained:

> Evidence that the defendant had a gun in his pocket but did not display it, or refer to it, could nevertheless support a conviction for "carrying" a firearm in relation to the crime if from the circumstances or otherwise it could be found that the defendant *intended to use* the gun if a contingency arose or to make his escape. The requirement in present section 924(c) that the gun be carried unlawfully, a fact usually proven by showing that the defendant was in violation of a State or local law, has been eliminated as unnecessary. The "unlawfully" provision was added originally to section 924(c) because of Congressional concern that without it policemen and persons licensed to carry firearms who committed Federal felonies would be subjected to additional penalties, even where the weapon *played no part in the crime*, whereas the section was directed at persons who *chose to carry a firearm as an offensive weapon for a specific criminal act*. * * * Moreover, the requirement that the firearm's use or possession be "in relation to" the crime would preclude its application in a situation where its presence *played no part in the crime*, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight.

S. Rep. No. 225 at 314 n.10, 1984 U.S.C.C.A.N. at 3492 n.10 (citation omitted) (emphasis added).

This passage is highly instructive. The highlighted language confirms Congress's intent that Section 924(c) reach only the active employment of a firearm to carry out a predicate offense. The first sentence, moreover, strongly suggests that Congress believed that "use" of a firearm consists of actions such as firing, displaying, or referring to the weapon during the predicate offense. In alluding to the possibility that circumstances might demonstrate

that a "defendant intended to use the gun if a contingency arose or to make his escape," the Report necessarily has in mind a concept of "use" that is active and could not include, for example, mere possession of the weapon for protection.[16] Furthermore, it indicates that even immediate access to a firearm (such as carrying it on one's person) is an insufficient basis for liability unless the gun played a direct role in the predicate offense.

The Committee did not mention any change to "use" liability occasioned by the addition of the phrase "during and in relation to." That fact is hardly surprising, however, once it is recognized that those requirements are *already implicit* in the concept of "use" Congress intended the statute to reflect both before and after the 1984 amendment – active employment of a firearm to carry out the predicate offense. See *United States* v. *Stewart*, 779 F.2d 538, 539-540 (9th Cir. 1985) (Kennedy, J.) (holding that "in relation to" requirement was implicit in pre-1984 version of statute with regard to carrying liability), cert. denied, 484 U.S. 867 (1987). In this connection, it is significant that S. 2572, a precursor bill passed but vetoed in 1982 (see note 15, *supra*), would have added to "carrying" but not to "use" liability the requirement that the predicate felony include as an element "the use of violence or threat of imminent violence as defined in section 16 of this title." See 128 Cong. Rec. 26,581, 26,610 (1982). Here again, there was no need to add that qualifier to the provision for "use" liability, since the idea of imminent violence was *already implicit* in the requirement that a firearm be "used."[17]

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[16] Discussing this passage in his dissent, Judge Williams correctly observed that "[t]he reference to *intended use* shows that Congress envisioned the 'carry' provision to punish a defendant who did not 'display' or otherwise actively use the firearm, but who had at least taken the active step of carrying the gun on a drug trafficking foray." J.A. 112 (emphasis added). "Thus the Senate evidently saw 'use' as a comparatively narrow term, with 'carry' picking up cases of an alternative type of activity, where the defendant did not actively 'use' the weapon." J.A. 112.

[17] Moreover, insofar as Congress intended to change the scope of *carrying* liability by adding the phrase "in relation to," Congress clearly meant to *limit* the statute's reach not, as the D.C. Circuit concluded (see note 3, *supra*), to expand it.

Finally, as Judge Williams observed (J.A. 111), the only two examples of using a firearm in violation of Section 924(c) mentioned in Senate Report 225 are both "active": "pointing it at a teller or otherwise displaying it whether or not it is fired." S. Rep. No. 225 at 314, 1984 U.S.C.C.A.N. at 3492. This suggests that Congress intended the statute, as amended, to continue to penalize as a "use" only the active employment of a firearm to carry out a crime. See also J.A. 111 ("While these examples were not presented as exhaustive, they provide insight into the general class of behavior Congress had in mind."). That intent, of course, is fully consistent with Congress's overarching purpose of addressing the serious problem of violent crime.

Thus, there is no basis for concluding that Congress intended to expand the meaning of "use" by amending the statute in 1984. And, of course, "Congress's adoption of the connective phrase 'during and in relation to' could not have been intended to adjust for evolving problems of passive drug crimes" because "Congress only added drug trafficking offenses as predicate crimes in 1986." J.A. 111 (Williams, J., dissenting).

3. *The Firearm Owners' Protection Act of 1986.* In 1986, Congress once again amended Section 924(c)(1). Pub. L. No. 99-308, § 104, 100 Stat. 449, 457. Congress expanded the definition of predicate offense from "crime[s] of violence" to include any "drug trafficking offense" and defined the latter as "any felony violation of Federal law involving the distribution, manufacture, or importation of any controlled substance." *Ibid.*

The legislative history of the 1986 law confirms Congress's intent to continue to punish under the "use" prong of Section 924(c) only active employment of the weapon to carry out the predicate offense. To begin with, the accompanying House Report in no way suggests an intent to expand the meaning of firearm "use" occurring "during and in relation to" a predicate offense. See H.R. Rep. No. 495, 99th Cong., 2d Sess. 27, 1986 U.S.C.C.A.N. 1327, 1353. Although Congress obviously intended to expand the eligible predicate offenses to include felony drug-trafficking crimes, this change, according to the Administration's own analysis of the legislation, was needed to "resolve the current uncertainty whether such crimes are crimes of violence." Assessment of Bureau of Alcohol, Tobacco, and Firearms,

reprinted in H.R. Rep. No. 495 at 17-18, 1986 U.S.C.C.A.N. at 1343-1344 (emphasis added).

Other passages in the House Report demonstrate that Congress did not intend to broaden the meaning of firearm "use." In explaining the rejection of a "self-defense" exception to Section 924(c), the House Report explained:

> Proponents of the self-defense amendment point out that the defense is not available to one protecting himself "from the danger which was the direct result of the commission of or attempt to commit a felony." They argue that a felon who *uses* a gun in the commission of a felony or in a shoot out with police while fleeing cannot therefore claim self-defense, since he is protecting himself from a danger that was the direct result of the felony.
>
> While this reasoning may rule out a successful self-defense claim in most situations in which the *use* branch of the offense forms the basis for the mandatory penalty prosecution, it would not have the same weight in the prosecution for *carrying* a firearm during the commission of a felony. Indeed, the "carrying" branch of the offense might be decimated, in that the felon could claim that he was only carrying the weapon for defense against other felons, and cite the fact that he did not actually *use* the weapon as proof of his claim. For example, a drug trafficker, if charged with carrying a firearm under 18 U.S.C. 924(c) in connection with drug trafficking, might be able to reasonably sustain a claim that it was carried for protection against rival traffickers.

H.R. Rep. No. 495 at 10, 1986 U.S.C.C.A.N. at 1336. A broad definition of "use," for example, cannot be reconciled with the committee's statement that in "*most situations*" in which "use" liability attaches the proposed self-defense provision would be unavailable because a defendant himself has created the danger by "*us[ing]* a gun in the commission of a felony *or in a shoot out with police while fleeing*." *Ibid.* (emphasis altered). Similarly, the committee's recognition that a felon who was carrying a weapon could often invoke the defense by claiming "that he was only carrying the weapon for defense against other felons," and citing "the fact that he did not actually *use* the weapon," suggests a

narrow understanding of the word "use" – one that would *not* include carrying a weapon for protection. Finally, the specific example contained in the final sentence of the text quoted above demonstrates beyond dispute that the House Judiciary Committee believed that a drug trafficker who carries a firearm for the purpose of protecting himself against "rival traffickers" would not be subject to liability under Section 924(c) for "use" of that firearm. If credited, that statement forecloses "use" liability when a weapon is merely possessed for protection.

The majority below (see J.A. 97) attached significance to another passage of the House Report (appearing immediately before the discussion of the self-defense proposal just quoted) in which the Judiciary Committee explained its decision not to add the phrase "in furtherance of any such crime of violence" to the *carrying* branch of Section 924(c) liability. See H.R. Rep. No. 495 at 9, 1986 U.S.C.C.A.N. at 1335. In rejecting that proposal as "unnecessary to prevent injustice," the committee noted that the proof of the new element "would involve additional analysis of the defendant's conduct, the circumstances *of the violent crime* and evidence of the defendant's state of mind." *Ibid.* (emphasis added). According to the majority below (J.A. 97-98), the committee's rejection of this amendment shows that "Congress carefully avoided any implication that it intended to narrow the relationship that must be shown between the gun and the predicate offense in order to support a conviction under § 924(c)(1)."

But that is true only with respect to *carrying* liability. As the subsequent discussion in the House Report of the self-defense proposal makes clear, the Judiciary Committee was acutely aware of the distinction between "use" and "carry" liability. Accord S. Rep. No. 583, 98th Cong., 2d Sess. 22 (1984) (discussing "in furtherance requirement" to be added by S. 914 to "carrying" liability). More fundamentally, the majority's reasoning rests on the mistaken assumption that the "in furtherance" language would have modified both "use" and "carry." But see S. 49, § 104, 99th Cong., 1st Sess. (1985) ("uses a firearm, or carries a firearm in furtherance of any such crime of violence"). Since the concept of "use" already embodied in Section 924(c)(1) included the idea of employment of the weapon "in furtherance of" the predicate

offense, there was simply no reason to alter the operative language relating to "use" liability.

Thus, there is no evidence in the legislative materials that Congress in 1986 intended to broaden the notion of firearm "use" (and much contrary evidence). Nor is it even clear that Congress intended to include passive drug-trafficking crimes as predicate offenses in 1986. After all, the 1986 amendment defined "drug traffic offense[s]" in a way that appeared to *exclude* such passive offenses – as "any felony violation of Federal law involving the *distribution, manufacture, or importation* of any controlled substance." Pub. L. No. 99-308, § 104, 100 Stat. 457 (emphasis added). And the House Report, at least, suggested that Congress meant simply to clarify that drug-trafficking offenses could qualify as crimes of violence. Only in 1988 was the definition of "drug trafficking crime" changed to read as it now does.

4. *The Anti-Drug Abuse Act of 1988.* Congress broadened the definition of "drug trafficking crime" in 1988 to include "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." Pub. L. No. 100-690, § 6212, 102 Stat. 4181, 4360. Congress thus made clear for the first time that a "drug trafficking offense" includes not just the more active crimes of distribution, importation, and manufacture but also passive crimes such as possession with intent to distribute. We have been unable to find *any* evidence in the slight legislative history of the 1988 Act to suggest that Congress considered, even for a moment, how the "carry" or "use" provision would function when applied to a predicate possessory offense.

In sum, Congress intended in passing the 1968 Act to limit "use" to active employment of a firearm to carry out the predicate offense; there is nothing to suggest that the 1984, 1986, or 1988 amendments were intended to broaden the scope of "use" liability; and indeed there is voluminous evidence in the legislative record to support the conclusion that Congress *continued* to have in mind an active concept of "use."

D. The Rule Of Lenity Supports Petitioners' Construction Of Section 924(c)(1)

Even if the Court were to conclude that the language, structure, and legislative history of Section 924(c)(1) do not compel the interpretation of "use" suggested above, there can be no serious doubt that our interpretation – accepted below by Judges Williams, Silberman, and Buckley – is a reasonable one, and that the statute is therefore *at least* ambiguous. See also *Long*, 905 F.2d at 1576 (Thomas, J.) (acknowledging "conventional, active connotation" of word "use"); *McFadden*, 13 F.3d at 468 (Breyer, C.J., dissenting) ("[c]ourts might have interpreted 'use' by insisting upon *activity* with the gun, such as firing it or brandishing it, or, at least, displaying it [ ]or even trading it for drugs"). Under the rule of lenity, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis* v. *United States*, 401 U.S. 808, 812 (1971) (citing *Bell* v. *United States*, 349 U.S. 81, 83 (1955)). That principle is dispositive here.

As the Court recently explained in *United States* v. *Granderson*, 114 S. Ct. 1259 (1994), the rule of lenity should be applied "where text, structure, and history" of a criminal statute "fail to establish that the Government's position is *unambiguously correct.*" *Id.* at 1267 (emphasis added). See also *McNally* v. *United States*, 483 U.S. 350, 359-360 (1987) ("The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language."). In light of the text and structure of the statute and the extensive legislative materials just summarized, any interpretation of "use" that includes more than active employment of the firearm to carry out the predicate offense is, surely, not "unambiguously correct."[18]

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[18] As explained in Sections I.A and B above, it is clear that no position other than one requiring active use could be unambiguously correct, even if one ignores the legislative history and considers only the text and structure of the statute, see *United States* v. *R.L.C.*, 503 U.S. 291, 307-311 (1992) (Scalia, J., joined by Kennedy & Thomas, JJ., concurring in part and concurring in the judgment), or considers the text and structure as informed by this Court's decisions and the background rules of statutory

The D.C. Circuit majority did not even mention the rule of lenity, much less attempt to explain why its proposed interpretation of "use" as "proximity and accessibility" is unambiguously correct. Indeed, the majority acknowledged that "'use' *could* be defined *either* narrowly, so as to encompass only the paradigmatic uses of a gun, i.e., firing, brandishing, or displaying the gun during the commission of the predicate offense, *or more broadly*, so as to include the other ways in which a gun can be used to facilitate drug trafficking." J.A. 93 (emphasis added). Without thorough analysis of the provision's "text, structure, and history" (*Granderson*, 114 S. Ct. at 1267), the court rejected the narrower interpretation on the ground that "nothing in the statute indicates that the Congress intended" it. J.A. 93. In addition to misreading Congress's intent, that conclusion violates the rule of lenity by placing the burden on the defendant affirmatively to support *his* (or her) reading of the statute, rather than on the government to prove the unambiguous correctness of its reading.[19]

If "use" of a firearm denotes active employment to carry out the predicate offense, this case is at an end. Petitioners' alleged "uses" of the firearms do not even begin to approach such active employment. Bailey was arrested after police officers found cocaine in the driver's compartment of his automobile. Locked in the trunk of the car, underneath "a whole lot of items," was a bag containing a firearm. There was no evidence – and certainly no evidence to support a finding *beyond a reasonable doubt* – that Bailey had ever used the firearm in any manner – *i.e.*, no evidence that he had *actively employed* it. Moreover, as the gun was

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interpretation, see *id.* at 311-312 (Thomas, J., concurring in part and concurring in the judgment).

[19] Although lenity "does not always require the 'narrowest' construction" of a criminal statute (*R.L.C.*, 503 U.S. at 306 n.6), it cannot seriously be disputed that the lower courts have found the statute's meaning to be something less than clear. If Congress wishes to impose a mandatory sentence of five, ten, twenty, or thirty years, and in some instances life imprisonment, based on firearms "used" in the fashion found by the juries in these cases, it should say so clearly.

neither being borne on Bailey's person nor within his immediate reach, he was not "carrying" the firearm. See note 5, *supra*.

The case against Robinson also fails. Robinson was arrested in her home. The gun that provided the basis for her Section 924(c)(1) enhancement was found at the bottom of a locked footlocker in a bedroom closet and was unloaded. As in Bailey's case, there was no evidence that Robinson had ever actively employed the firearm in any manner. And, as the gun was locked away in another room of the house, it was not being borne on Robinson's person. No rational jury could have concluded beyond a reasonable doubt that Robinson used a firearm in relation to a drug-trafficking crime.

II. WHETHER A DEFENDANT "USED" A FIREARM "DURING AND IN RELATION TO" A SPECIFIC PREDICATE OFFENSE SHOULD, AT A MINIMUM, BE ASSESSED IN LIGHT OF ALL RELEVANT FACTORS

If this Court declines to adopt the definition of "use" set forth above, then it must undertake to define that term by drawing a line somewhere else along the continuum between discharging the weapon on the one hand and mere presence of the firearm during the predicate offense on the other. As a review of the lower courts' decisions in this area demonstrates, "it is easier to see the need to distinguish (drug-crime-related) 'use' from 'possession' than it is to explain just how to make the distinction." *United States* v. *McFadden*, 13 F.3d 463, 468 (1st Cir. 1994) (Breyer, C.J., dissenting). Although it is difficult to describe the line between use and non-use (other than in the manner suggested in Part I above), it is a good deal easier to say what "use" is not. As explained below, several clear limits on the concept of "use" are apparent from the language, structure, and legislative history of Section 924(c), but have been misunderstood by some of the lower courts: *first*, mere possession during the predicate offense is a necessary but not a sufficient condition for firearm "use"; *second*, Section 924(c) criminalizes the "use" of a firearm, but not its mere potential or intended use; *third*, accessibility of the firearm to the defendant, even immediate accessibility, does not in and of itself constitute "use"; and, *fourth*, a defendant does not "use" a firearm "in relation to" a predicate offense merely by having it sufficiently nearby or available that it can be said to "embolden" him.

Once these limits on "use" liability are recognized, it is clear that the D.C. Circuit's "proximity and accessibility" test is erroneous and should be rejected. That test sweeps in many cases that rest outside several of the foregoing boundaries. It can also produce absurd results, as Judge Wald explained in her dissent. J.A. 104-105. And it permits an appellate court to conclude that "use" has been proved beyond a reasonable doubt without regard to several factors that are relevant (and potentially dispositive) on that issue. We submit that all of the following are relevant to determining whether a gun was "used": (1) the accessibility of the firearm to the defendant, (2) any proof of an actual drug transaction during which the firearm was actively employed, (3) the type, condition and number of firearms involved; (4) whether the firearm was loaded and ready to fire; and (5) expert testimony concerning the government's particular theory of use. These factors, moreover, should be assessed in light of the specific nature of the predicate offense. Once the evidence in petitioners' cases is reviewed in light of *all* of these factors, it is manifest that their convictions should be reversed.

A. The Language, Structure, And Legislative History Of Section 924(c) Demonstrate That Congress Intended Several Important Limitations On The Concept Of Firearm "Use"

1. Possession Is Necessary But Not Sufficient To Show "Use" Of A Firearm

Many of the lower federal courts (including the D.C. Circuit, see J.A. 82) have recognized that mere possession of a firearm during and in relation to a predicate offense is not enough to qualify as "use." See, *e.g.*, *United States* v. *Wilson*, 884 F.2d 174, 177 (5th Cir. 1989). On the other hand, this principle has not been universally acknowledged. See, *e.g.*, *United States* v. *Paz*, 927 F.2d 176, 179 (4th Cir. 1991). For several reasons, the Court should recognize this important limit on the concept of "use."

First, the word "use" carries "a more active meaning – a meaning that excludes simple (drug-crime-related) possession." See *McFadden*, 13 F.3d at 467 (Breyer, C.J., dissenting). Second, if mere possession of a firearm qualified as "use," there would be

no reason for the statute to mention "carry" as an independent basis for liability. As explained above (at page 16 and note 5), "carrying" is a particular kind of possession – bearing on one's person, or having within one's immediate reach while moving together with the object. Thus, interpreting "use" to mean mere possession violates the principle that each word in a statute must be given effect. *United States Department of Treasury* v. *Fabe*, 113 S. Ct. 2202, 2209-2210 (1993).

Third, Congress obviously knows how to criminalize possession and has not done so in Section 924(c). See *McFadden*, 13 F.3d at 467 (Breyer, C.J., dissenting). The criminal statutes relating to firearms are replete with examples of crimes of possession.[20] Perhaps the strongest evidence, moreover, is Section 924(c)'s companion provision, which imposes an enhanced sentence on anyone who, during and in relation to a crime of violence or a drug-trafficking crime, "uses or carries a firearm *and is in possession of* armor piercing ammunition." 18 U.S.C. § 929(a) (emphasis added).

Fourth, as then-Chief Judge Breyer observed in his *McFadden* dissent (13 F.3d at 467), the legislative history of Section 924(c) weighs heavily against equating "use" with "possession." The House Report accompanying the 1986 amendment to Section 924(c), in discussing the "carrying" branch of the statute, gave as an example of someone who might escape liability a drug trafficker who "carried [a weapon] for protection against rival traffickers." H.R. Rep. No. 495 at 10,. 1986 U.S.C.C.A.N. at 1336; see page 30, *supra*. "Such a person quite clearly 'possesses' the weapon with the intent to make active use of it if necessary; yet, the Report adds, 'he did not actually *use* the weapon.'" *McFadden*, 13 F.3d at 467 (dissent). Nor is this the only example in the legislative history that supports this analysis. The Senate Report accompanying the 1984 amendment explained that "the requirement that the firearm's use or possession be 'in relation to' the crime would preclude its application in a situation where its presence played no part in the crime, such as a gun carried in a

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[20] See, *e.g.*, 18 U.S.C. §§ 922(g), 922(j), 922(k), 922(*o*)(1), 922(v)(1), 922(w)(1), 922(x)(2), 930(a), 930(b), 930(e)(1).

pocket and never displayed or referred to in the course of a pugilistic barroom fight." S. Rep. No. 225 at 314 n.10, 1984 U.S.C.C.A.N. at 3492 n.10; see page 27, *supra*.

Fifth and finally, if "use" means nothing more than mere possession, then Section 924(c) will essentially "swallow up" the Sentencing Guideline that specifically addresses drug-related gun possession. See U.S.S.G. § 2D1.1(b)(1); *McFadden*, 13 F.3d at 466-468 (Breyer, C.J., dissenting); see also note 6, *supra*. That result, however, would undercut Congress's "effort to create a fairly sophisticated Sentencing Guidelines system that distinguishes among different kinds of criminal behavior and punishes accordingly." *McFadden*, 13 F.3d at 467-468 (Breyer, C.J., dissenting).[21]

Although possession alone is not enough to constitute "use," it is clear that use of a firearm cannot occur without possession. See *United States* v. *Long*, 905 F.2d 1572, 1576-1579 (D.C. Cir.) (Thomas, J.), cert. denied, 498 U.S. 948 (1990). Possession is thus the minimum nexus between the defendant and the weapon necessary to support a conviction.

2. Section 924(c) Criminalizes Use Of A Firearm, Not Mere Potential Or Intended Use

A second important limitation on "use" apparent from the language, structure, and legislative history of Section 924 – and conceded by the Solicitor General in this case – is that "use" of a firearm cannot mean mere "potential use" or even "intended use." See Br. in Opp. 20 ("Section 924(c) requires * * * actual (not future) use" of a firearm). That "use" cannot mean the *potential for use* is apparent for several reasons. In addition to draining every connotation of action from the word "use," that standard would be satisfied in most if not all cases of simple possession of

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[21] To the extent that Section 924(c)'s mandatory minimum provision is an "ad hoc deviation" from Congress's "more general policy" of sentencing as expressed in the Sentencing Guidelines, the Court should seek to avoid reading the term "use" in Section 924(c) "with *unnecessary* breadth." *McFadden*, 13 F.3d at 468 (Breyer, C.J., dissenting). As explained in Part I above, one way to accomplish that result is to read "use" according to its ordinary meaning.

a firearm. Whenever a firearm is possessed, after all, there is at least some *potential* that it may be employed. But as explained above, whatever else it means, the term "use" cannot encompass instances of mere possession. Allowing "use" to be found when there is only the potential for use would also render the "carrying" prong entirely superfluous. Every time a firearm is carried there is, at least in theory, a possibility that it will be put to use. Had Congress intended "use" of a firearm to encompass all situations where the firearm potentially might be deployed, there would have been no need to mention "carrying" liability.

Equally clear is Congress's desire not to penalize the mere intent to use a firearm – as the Solicitor General has conceded (Br. in Opp. 20) and the panel in *Robinson* correctly recognized (J.A. 53, citing *United States* v. *Bruce*, 939 F.2d 1053, 1055 (D.C. Cir. 1991)). After all, Section 924(c), by its terms, targets two types of *activity* with a firearm – use and carrying – that are required to have a close nexus to certain predicate offenses. It does not penalize mere intentions. A contrary interpretation of the statute, moreover, would be difficult if not impossible to reconcile with Section 924(d), which provides for forfeiture of firearms "used" in certain offenses *and* of firearms "intended to be used." See also pages 19-20 and note 9, *supra*.

3. Accessibility Of The Firearm To The Defendant, Even Immediate Accessibility, Is Not Sufficient To Establish Liability For "Use"

A third important limitation apparent from the text, structure, and history of Section 924(c) is that it does not make unlawful the presence of a firearm during a predicate offense merely because the weapon is accessible (even immediately accessible) to the defendant. So much is clear from the fact that Congress designed the statute not to reach all instances of carrying, but only those where the carrying is "in relation to" the predicate offense. See also pages 27-28, *supra*. There is simply no reason why Congress would have excluded *any* instances of carrying if immediate accessibility were enough to establish liability under the statute.

4. A Firearm Is Not Used In Relation To The Predicate Offense Merely Because Its Presence "Emboldens" The Defendant

It is equally clear that a defendant may not be convicted of using a firearm on the theory that the firearm "emboldens" the defendant to commit the predicate offense. That theory is too broad. In many instances, it would criminalize the mere possession of a firearm during the predicate offense, since such possession frequently can be alleged to "embolden" the defendant. Similarly, the emboldening theory subsumes almost every case where the firearm is accessible to the defendant. As just explained, however, accessibility alone cannot properly be the basis for liability. And, insofar as a defendant who is carrying a firearm can always be described as "emboldened," the theory also renders the carrying element superfluous.

The emboldening theory is erroneous not only because it does not describe a "use" of the firearm, but also because the kind of relationship to the offense it describes is not one made criminal by Section 924(c). In *Smith*, this Court observed that the phrase "in relation to" is "expansive"[22] and that, "at a minimum, [it] clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." 113 S. Ct. at 2059.

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[22] The Court cited *District of Columbia* v. *Greater Washington Board of Trade*, 113 S. Ct. 580 (1992), a case construing the phrase "relates to" in the preemption clause of ERISA. The analogy to the broadly worded ERISA preemption clause (see *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 138-139 (1990)) cannot be carried too far, however, because the relationships targeted by that clause and by Section 924(c) are entirely different. Whereas ERISA's preemption clause refers to the relationship between state laws and ERISA plans, Section 924(c) targets the relationship between certain actions (*e.g.*, "carrying" a firearm) and predicate offenses. See, *e.g.*, *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 115 S. Ct. 1671, 1677 (1995) (noting that state law may "relate to" an ERISA plan if the law "makes 'reference to' ERISA plans in any manner"). In any event, the Court made clear as recently as *Travelers* that not all laws that have an effect on ERISA plans can be said to "relate to" those plans. *Id.* at 1680.

The Court in *Smith* had no need, however, to "determine the precise contours" of this requirement because Smith's gun "was an integral part of the transaction," and "[w]ithout it, the deal would not have been possible." *Ibid.* (internal quotations omitted).

If the gun plays a pivotal role and has a tangible effect on the successful commission of the underlying offense, there is no doubt that the use is "in relation to" that offense. But if the "use" is less important to accomplishing the unlawful acts constituting the predicate offense, then the "use" must at least have a direct impact or effect on the predicate offense. It is not enough that the firearm embolden the defendant in the commission of the predicate offense.

Finally, the emboldening theory should be rejected as too indeterminate and as impossible to administer. J.A. 116 (Williams, J., dissenting). The theory invites juries and courts to speculate about whether a defendant was psychologically comforted by the existence of a gun, an inquiry that is inherently incapable of proof beyond a reasonable doubt, virtually incapable of consistent application, and impossible to review. Thus, the "emboldening" rationale promises either "a carte blanche for conviction" or a "continuous and vacillating review of jury verdicts." J.A. 116. That cannot and should not be the law.

B. The D.C. Circuit's "Proximity And Accessibility" Test Is Inconsistent With The Foregoing Limitations And Is Otherwise Erroneous

The majority below rejected the "open-ended test" previously used in the D.C. Circuit and "replace[d] it with a test [for 'use'] that looks to two factors only": (1) the proximity of the gun "to the drugs, drug paraphernalia, or drug proceeds" involved in the underlying offense; and (2) "the accessibility of the gun to the defendant from the place where the drugs, drug paraphernalia, or drug proceeds are located." J.A. 80, 101. One "uses" a gun within the meaning of Section 924(c)(1), the court held, by placing *or keeping* the gun in a location "from which one (or one's agent) can gain access to it *if and when needed to facilitate a drug crime*." J.A. 95 (emphasis added). The court held further that, when the predicate drug offense is a "continuing offense" such as possession with intent to distribute, the government need not show that the gun was in such a place at the time the defendant was ar-

rested; it is enough to show that the defendant "put or kept the gun" in such a place "at some point" in time during the defendant's possession of drugs. J.A. 95.

This test suffers from numerous flaws and should be rejected. As a threshold matter, it is difficult to see how the D.C. Circuit's "proximity" factor adds anything to the "accessibility" factor. As Judge Wald correctly noted in her dissent, "whenever the guns are located proximately to the drugs, they must also be potentially accessible to the defendant *from the place the drugs are being stored*." J.A. 103. Thus, the majority's test essentially collapses into a single factor: the firearm's proximity – not to the defendant, but to the "drugs, drug paraphernalia, or drug proceeds." J.A. 80, 101. Yet the statute plainly does not criminalize storing or keeping a firearm in the same place as money or ziplock bags or even drugs – it criminalizes contemporaneous *use* of the gun in relation to a predicate drug-trafficking offense. See also J.A. 102 ("Congress * * * created no statutory presumption that 'use' automatically would follow from the presence of any particular factors, and I can find no authority for courts to do so."). Indeed, the Solicitor General so concedes. Br. in Opp. 20 & n.4. The majority's test is impossible to reconcile with the plain language of the statute.

In addition to this shortcoming, the D.C. Circuit's test runs afoul of several of the necessary limits on "use" described above. The D.C. Circuit majority reasoned that a firearm kept in an accessible location is "used" because it can serve to protect the defendant, drugs, and drug proceeds. J.A. 95, 96. But that rationale is necessarily too broad, if in fact Section 924(c) does not reach mere possession, because it would apply "virtually whenever a gun is present near the scene of a drug crime." *McFadden*, 13 F.3d at 469 (Breyer, C.J., dissenting). Such a "possession for protection" theory sweeps all cases of mere possession within the ambit of "use" because all firearms – even those that are only possessed – have a potential utility. See *ibid.*; see also *United States* v. *Sullivan*, 919 F.2d 1403, 1432 & n.45 (10th Cir. 1990) (rejecting the "possession for protection" rationale), cert. denied, 113 S. Ct. 1013 (1993).

By focusing on the proximity of a firearm, and by relying on *inferences* of *potential* use rather than *evidence* of *actual* use, the

court affirmed petitioners' convictions based on the "theoretical possibility" of use rather than on use itself. See *McFadden*, 13 F.3d at 468 (Breyer, C.J., dissenting). The "proximity" standard is inconsistent with the ordinary, active meaning of "use" (see *id.* at 466-467) and expands it to include mere potential use "when needed to facilitate a drug crime." J.A. 95.

Furthermore, the continuing nature of the predicate drug offense of possession with intent to distribute cannot justify inferring past use of a firearm from present possession. *United States* v. *Clemis*, 11 F.3d 597, 602 (6th Cir. 1993), cert. denied, 114 S. Ct. 1858 (1994). Here again, such a principle subsumes all cases of mere possession and permits conviction based on mere speculation of past use. The present case illustrates that problem. With regard to petitioner Bailey, for example, the prosecution presented no evidence whatever that he actually employed the firearm in his trunk at any time in the past. Accordingly, the court relied on generalizations about the prevalence of gun usage in the drug world (J.A. 98, 100) to conclude that past use could be inferred – *beyond a reasonable doubt* – from Bailey's possession of a firearm at the time of arrest. Permitting one person to be convicted on the basis of assumptions about other persons' conduct demonstrates the limitless reach of the majority opinion's interpretation of "use."

Nor can the majority's holding be reconciled with Congress's intent, clearly expressed in Section 924(d), to penalize "use" instead of mere "intended use." J.A. 112 (Williams, J., dissenting); see also pages 19-20, *supra*. As Judge Williams correctly noted, the majority's test departs from Congress's intent by essentially "dilut[ing] 'use' to mean simply possession with a floating intent to use." J.A. 108.

The D.C. Circuit's test also should be rejected because it could lead to absurd results. As Judge Wald explained,

> if the guns and drugs are found [all together] in a locked strongbox and the defendant is miles away, under the majority's test, the guns are arguably accessible to the defendant from the place where the drugs are stored and are being "used" to facilitate the possession of the drugs. To state the proposition is to reveal its illogic. Under the statute it is the

defendant who must use the gun, so it is the accessibility of the gun to him at the time of the drug offense charged that is relevant, not the accessibility of the gun to a phantom defendant who is positioned where the drugs are.

J.A. 103-104 (dissent). Thus, if the predicate offense is possession with intent to distribute and the defendant is "not in the immediate vicinity of the scene where the drugs and guns are found," the majority's test "can produce a ridiculous result." J.A. 104; see also J.A. 105 ("A defendant cannot have been 'using' a gun to protect drugs when he was nowhere near the gun."). This Court will avoid a construction of a statute that would lead to absurd results – even if the literal terms of the statute are far more helpful to that construction than are the terms here. See, *e.g.*, *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504, 510-511 (1989); *id.* at 527 (Scalia, J., concurring in the judgment).[23]

C. Courts Should Consider A Variety Of Relevant Factors In Determining Whether There Was Sufficient Evidence Of Use

To draw the line between "possession" and "use," and thus to determine which conduct will be punished by Section 924(c) and which by the Sentencing Guidelines instead (see page 17 and note 6, *supra*), some courts have examined various indicia of "use" and have upheld enhancements only when there were strong indications that the possession of the guns was for the protection of the drugs and thereby actually facilitated the possession with intent to distribute. The factors that should be reviewed (which have been developed by the courts of appeals, see *McFadden*, 13 F.3d at 468 (Breyer, C.J., dissenting)) are (1) the accessibility of the firearm

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[23] The D.C. Circuit's test should also be rejected because of the rule of lenity. Whatever else may be said of the majority's two-factor test, it is not an interpretation of Section 924(c) that would be apparent to the ordinary citizen. See *United States* v. *Aguilar*, 63 U.S.L.W. 4637, 4639 (U.S. June 21, 1995) ("We have traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress, and out of concern that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.") (citations and internal quotations omitted).

to the defendant, (2) any proof of an actual drug transaction during which the firearm was used, (3) the type and number of firearms involved, (4) whether the firearm was loaded and ready for use, and (5) expert testimony concerning the government's case-specific theory of use.

1. *Accessibility Of Firearm To Defendant.* A factor courts have used to distinguish between use and possession is "the accessibility of the gun to the defendant." *United States* v. *Morris*, 977 F.2d 617, 621 (D.C. Cir. 1992); *Derr*, 990 F.2d at 1338; *United States* v. *McKinnell*, 888 F.2d 669, 675 (10th Cir. 1989). If a gun is sufficiently accessible to a defendant, that factor lends some support to an inference that the gun provided protection for the drug offense or that the defendant derived some service from the gun. By itself, this factor is not sufficient to establish use, as explained above. See *United States* v. *Conner*, 972 F.2d 1172, 1174 (10th Cir. 1992) ("[m]ere access to a firearm is insufficient to sustain a conviction" under Section 924(c)). Accessibility coupled with other circumstances can support a conviction, but *in*accessibility of a firearm strongly undermines a conviction.

2. *Proof Of A Drug Transaction.* A second indicium of firearm "use" is proof of an earlier drug transaction at which the firearm was actively employed or available to protect the drug operations. *Morris*, 977 F.2d at 622; *Bruce*, 939 F.2d at 1055; *United States* v. *Fermin*, 32 F.3d 674, 678 (2d Cir. 1994), cert. denied, 115 S. Ct. 1145 (1995); *United States* v. *Feliz-Cordero*, 859 F.2d 250, 254 (2d Cir. 1988); *United States* v. *Theodoropoulos*, 866 F.2d 587, 597 (3d Cir. 1989). Evidence of such a transaction is particularly important when the predicate offense is possession with intent to distribute, because the transaction can bridge the gap between the active verb "use" and the "passive crime" of possession. *Bruce*, 939 F.2d at 1055. Evidence of a previous transaction that the firearm facilitated would be circumstantial evidence that the firearm was "used" during the later offense as well as that the defendant had incorporated it into a drug-trafficking operation. *United States* v. *Reyes*, 930 F.2d 310, 313, 314 n.5 (3d Cir. 1991).

3. *The Type, Condition, And Number Of Firearms Involved.* Many courts of appeals have ruled that the number of firearms involved in the predicate drug-trafficking offense is relevant in deter-

mining whether the firearms were "used"; the more guns present, the stronger the inference of use. Compare, *e.g.*, *Bruce*, 939 F.2d at 1056 (conviction reversed where only a single firearm was involved), and *Feliz-Cordero*, 859 F.2d at 254 (same), with *Morris*, 977 F.2d at 622-623 ("arsenal" of weapons supported Section 924(c) conviction), and *United States* v. *Williams*, 952 F.2d 418, 421 (D.C. Cir.) (same), cert. denied 113 S. Ct. 148 (1992). Although the "use" of a single weapon violates the statute, a purely circumstantial showing of "use" is weakened by the fact that no other weapons were present. The type and condition of a gun may also be relevant to whether it was used by a defendant and in what fashion. For example, a very large weapon such as a rifle would be difficult to "use" in a fashion that requires concealment on one's person. Similarly, if the weapon is not readily operable, its utility would be impaired. Thus, the specific features of the firearm in question are relevant to whether the gun was "used."

4. *Whether The Firearm Was Loaded And Ready To Fire.* Some courts of appeals have stated that an inference of "use" is strengthened when the firearm at issue is loaded. *Morris*, 977 F.2d at 622; *Derr*, 990 F.2d at 1338. Others, by contrast, have ruled that whether a gun is loaded is irrelevant to whether it is used because even an unloaded gun increases the risk of violence, and because "it is very difficult for a person to determine whether a gun was loaded or not when the gun is pointed at that person." *United States* v. *Gutierrez-Silva*, 983 F.2d 123, 124-125 (8th Cir. 1993); see also, *e.g.*, *United States* v. *Willis*, 6 F.3d 257, 265 (5th Cir. 1993). Certainly, this factor is relevant in at least some cases, depending on the government's theory of how the gun was "used" in a particular case.

5. *Expert Testimony.* Finally, some courts have looked to whether expert testimony bolstered the government's theory of "use" as advanced in a particular case. *Morris*, 977 F.2d at 622; *Derr*, 990 F.2d at 1338.[24] An expert's testimony concerning a

[24] Testimony by a government witness that guns are *often* or *typically* associated with drug operations cannot be considered particularly probative. *Derr*, 990 F.2d at 1339 (such evidence is only "marginally helpful to the prosecution"); see also *Bruce*, 939 F.2d at 1055 (expert testimony that guns and drugs "go hand in hand" insufficient to bolster inference of use). Rather, the testimony must help establish that "the gun *in this case* was used to protect the possession of *these* drugs." *Derr*, 990 F.2d at 1339 (second emphasis added).

specific firearm or the nature of drug-trafficking operations can sometimes serve to rule out certain "uses" for the weapon.

No single criterion identified above has dispositive weight; rather, courts must balance the criteria in determining whether a defendant "used" a firearm in connection with the predicate drug-trafficking offense. *Derr*, 990 F.2d at 1338. As next explained, that balancing process yields but one conclusion: the convictions of both petitioners should be reversed.

D. Once These Factors Are Considered, Both Petitioners' Convictions Should Be Reversed

The evidence presented at petitioners' trials was insufficient to prove, beyond a reasonable doubt, that either Bailey or Robinson "used" a firearm during the predicate offense of possession of cocaine with intent to distribute it. As an examination of the relevant factors makes clear, the evidence showed, at most, that each petitioner possessed, but did not use, a firearm.

1. Bailey was stopped for a traffic offense. When the police searched the car's interior, they found one round of .380-caliber ammunition on the console and a satchel containing 30 grams of cocaine in 27 plastic bags. J.A. 18, 80; 2/27/90 Tr. 74-75, 93, 106, 125. After arresting Bailey, the officers unlocked the car trunk (which was inaccessible from the passenger compartment) and found a vest containing approximately $2500 in cash. 2/27/90 Tr. 97-98, 117. Beneath "a whole lot of items," including "clothing and bags and other things," the police also found a bag containing a 9-mm. handgun that was "loaded with one clip" of ammunition containing six .380-caliber bullets. J.A. 6, 9; 2/27/90 Tr. 106. The police officers could not see the gun when they opened the trunk; indeed, the trunk was so full that it took roughly one minute to find the bag containing the gun. J.A. 9. Bailey also had approximately $700 on his person.

This evidence was insufficient to support a finding that Bailey "used" a firearm "in relation to" the crime of possession of co-

caine with intent to distribute it. There was no evidence that Bailey handled, brandished, displayed, referred to, or otherwise actively employed the firearm. With regard to accessibility, the gun was located in the locked trunk of the car Bailey was driving. In the court below the government conceded that "the firearm was relatively inaccessible." United States' Response to Appellant's Petition for Rehearing With Suggestion For Rehearing En Banc at 2. Indeed it was. No reasonable jury could find beyond a reasonable doubt that the gun in Bailey's car provided any protection to Bailey based on such attenuated availability.

In addition, there was no proof that Bailey had previously engaged in an actual drug transaction during which the firearm was used. The jury did find Bailey guilty of possession with *intent* to distribute. But there was insufficient evidence to find *actual distribution* – as the government implicitly conceded by not charging that crime and explicitly conceded in oral argument below (En Banc Tr. 57) – and it would require still a further unsupported inference to conclude beyond a reasonable doubt that Bailey, in a hypothetical transaction the government did not prove, used a firearm.[25]

The third factor (type and number of firearm) likewise favors Bailey. There was only one firearm involved. In addition, although the gun recovered from the trunk of Bailey's car was a 9-mm. pistol, according to the government's own expert it was loaded with much smaller .380 ammunition and thus incapable of firing more than one bullet unless the empty shell was manually removed and another bullet manually chambered.

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[25] The panel opinion illustrates the dangers of such speculation. The majority there conjectured, with no evidence beyond the contents of Bailey's car when he was stopped: "As [Bailey] walked from his car to the point of sale, like any drug dealer he was constantly in danger of being attacked by bandits or by a potential customer. Until the actual sale, of course, he possessed the narcotics. In effect, for a drug dealer on the streets, possession and distribution are inextricably linked * * * and the jury could reasonably conclude that during the tense moments leading up to the exchange of drugs and money, Bailey used the gun in the trunk to protect his inventory of drugs * * *." J.A. 27. This is rank speculation.

Fourth, the pistol found in Bailey's trunk, though loaded with a clip containing six bullets, was not yet ready to fire because a bullet had not been chambered.

Finally, the expert testimony presented at trial concerning the government's particular theory of use weighed significantly in Bailey's favor. According to the government's expert, the purpose of having a firearm within reach was for protection against "stick-up boys" who try to steal the drugs or money. J.A. 11-13. The expert agreed that, "[i]f you are trying to protect yourself" in this way, the weapon's "power and speed" are "what's most important." 2/27/90 Tr. 166-167. He also emphasized that a drug seller would need immediate access to his firearm because he would get no notice before a "stickup boy" confronted him. J.A. 13. Yet Bailey lacked immediate access to the gun, and the gun, loaded with a clip of .380-caliber bullets, lacked the "power and speed" that the expert said was so important. On this evidence, the jury could not have found "use" beyond a reasonable doubt.

2. The evidence presented at Robinson's trial was woefully deficient. The Derringer locked in a box in Robinson's closet was not accessible to her. The evidence at her trial showed that Parker, not Robinson, had the keys to the box. See 10/30/91 Tr. 110 (testimony of Sharine McKinney) (Parker "was the only one with the key, period"). Robinson periodically was able to gain access to the box, but there is no evidence that she had such access any time on July 16, 1991, or that such access had ever been employed to facilitate a drug transaction. Without access to the box on that date in the time before the police executed the search, Robinson would have lacked access to the Derringer.

Although there was evidence from which the jury inferred that a distribution offense occurred on July 15, that offense was not the predicate of the 924(c) charge. In any event the eyewitness testimony about that transaction showed that the Derringer played *no* role. As to the events of July 16, which *were* the predicate for the 924(c) charge, Robinson was charged with only a possessory offense, not actual distribution, and there was no evidence that the Derringer played any role even in *Parker's* distribution offense.

The remaining relevant factors likewise weigh strongly in Robinson's favor. As in Bailey's case, there was only one firearm

involved. In addition, it was unloaded (with no ammunition even found in the apartment) and thus necessarily unready to be fired. Finally, the government's expert gave testimony that supported the limited utility of the unloaded .22-caliber Derringer. According to the government's theory, this kind of weapon was a "second gun" – the type of weapon a drug dealer would "keep hidden on [her] person and use it until [she] get[s] [her] real gun." 10/30/91 Tr. 79; J.A. 49. But there was no evidence – none – that petitioner even knew of the gun's existence, much less ever had it hidden on her person. This factor, as well, also weighs strongly against any finding of use.

The evidence presented against Robinson could not support a finding, beyond a reasonable doubt, that she "used" the Derringer during and in relation to the July 16 offense. Robinson's conviction on the Section 924(c) count accordingly should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[*] Counsel gratefully acknowledge the assistance of Kevin B. Huff, a student at Columbia Law School, in the preparation of this brief.

APPENDIX

(a)(1)

* * * * *

(a)(5)* Whoever knowingly violates subsection (s) of (t) or section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(5)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if—

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)—

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the com-

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* So in original. Two subsecs. (a)(5) were enacted.

mission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this section, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Provided*, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United

States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are—

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(*l*), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.), for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacturer or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

* * * * *

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3) or drug trafficking crime (as defined in subsection (c)(2) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

* * * * *

(i) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

* * * * *

(n) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

Nos. 94-7443 and 94-7492

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

RONALD J. BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA

CANDISHA S. ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether evidence that the defendant placed a firearm near to drugs or drug proceeds to provide protection or security and that the firearm was accessible to the defendant during the commission of a drug trafficking offense is sufficient to support a conviction for using a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1).

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Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104, 100 Stat. 457 33-34
Gun Control Act of 1968, Pub. L. No. 90-618, sec. 102, § 924(c), 82 Stat. 1224 24
18 U.S.C. 111(b) 22
18 U.S.C. 841(a)(1) 4
18 U.S.C. 922(a)(1) 25
18 U.S.C. 922(a)(3) 26
18 U.S.C. 922(a)(5) 26
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18 U.S.C. 924(d)(1) 25
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21 U.S.C. 856(a) 2-3
21 U.S.C. 860(a) 2

Miscellaneous:

Black's Law Dictionary (6th ed. 1990) 12
A. Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, H. John Heinz III School of Public Policy and Management, Carnegie Mellon Univ. Working Paper Series (1994) 40
114 Cong. Rec. (1968):
p. 22, 229 29
pp. 22, 229-22, 230 28
p. 22, 231 27
p. 22, 234 29
p. 22, 235 29
p. 32, 965 43
H.R. Rep. No. 495, 99th Cong., 2d Sess. (1986) 34
S. Rep. No. 225, 98th Cong., 1st Sess. (1983) 22, 23, 29, 30, 31
Sheley, *Drug Activity and Firearms Possession and Use By Juveniles*, 24 Journal of Drug Issues 363 (1994) 40
19 *The Oxford English Dictionary* (2d ed. 1989) 12
The Random House Dictionary of the English Language (2d ed. unabridged 1987) 12
Webster's Third New International Dictionary, Unabridged (1986) 12

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-7448

RONALD J. BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 94-7492

CANDISHA S. ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the en banc court of appeals (J.A. 78-119) is reported at 36 F.3d 106. The opinion of the panel in 94-7448 (J.A. 17-32) is reported at 995 F.2d 1113. The opinion of the panel in 94-7492 (J.A. 47-77) is reported at 997 F.2d 884. The opinion of the district court in 94-7492 (J.A. 38-46) is reported at 779 F. Supp. 606.

JURISDICTION

The judgment of the en banc court of appeals was entered on October 4, 1994. The petition for a writ of certiorari in No. 94-7448 was filed on December 28, 1994. The petition for a writ of certiorari in No. 94-7492 was filed on December 29, 1994. The petitions for certiorari were granted and the cases were consolidated on April 17, 1995. J.A. 34, 120. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. 924(c)(1) is reprinted in pertinent part in an appendix to this brief.

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioner Bailey was convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g); and using or carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1). He was sentenced to 51 months' imprisonment on the cocaine possession charge, a concurrent 51-month prison term on the felon in possession charge, and a consecutive 60-month prison term on the using or carrying a firearm charge. J.A. 19.

Following a jury trial in the United States District Court for the District of Columbia, petitioner Robinson was convicted of distribution of cocaine base, in violation of 21 U.S.C. 841(a)(1); possession of cocaine with intent to distribute it, in violation of the same statute; commission of narcotics offenses within 1000 feet of a school, in violation of 21 U.S.C. 860(a); maintenance of a building for the purpose of manufacturing, storing, distributing, or using cocaine base, in violation of 21 U.S.C. 856(a); and using or carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1). She was sentenced to concurrent 97-month terms of imprisonment on the narcotics counts and a consecutive 60-month prison term on the using or carrying a firearm count. J.A. 38, 82.

1. a. In May 1988, petitioner Bailey was stopped by two District of Columbia Metropolitan Police Officers when they noticed that he was driving a car that lacked a license plate and inspection stickers. When Bailey, who failed to produce a driver's license, complied with the officers' instructions to get out of his car, they observed him attempt to conceal an item between the seat and front console. When one of the officers moved the driver's seat back, a white plastic packet of cocaine and a brown leather pouch fell from between the seat and console to the floor of the car. The pouch contained 26 additional packets of cocaine. The officers also discovered a single round of live .380 caliber ammunition on the console of the car. J.A. 3-4, 18; *Bailey* Feb. 27 Tr. 59-65. Approximately $700 was recovered from petitioner Bailey's person. Feb. 27 Tr. 97-98. It turned out that the car belonged to Bailey, who had purchased it about two weeks earlier. Feb. 28 Tr. 7-11.

After arresting Bailey, the officers searched the trunk of the car. Among several bags of clothing, they discovered a loaded nine millimeter Smith and Wesson pistol and about $2,500 in currency concealed in a vest jacket. J.A. 5-7, 18; *Bailey* Feb. 27 Tr. 92-96, 97, 135.

b. At trial, an experienced narcotics detective testified that the cocaine found in Bailey's car was packaged for sale in $50 bags. He also testified that drug dealers frequently "use the[ir] weapons not only to protect themselves, but [also] to protect their assets, drugs and money" from "stickup men," who "know [the dealers] have two things—drugs and money." J.A. 10. Finally, he explained that "weapons are used for enforcement purposes. They are also used to protect [a drug dealer's] turf. Drug

dealers get very territorial. They like to protect the areas they deal from. They will use the weapon to protect their areas." J.A. 10. See also *Bailey* Feb. 27 Tr. 157, 160.

Bailey was convicted, *inter alia*, of possession of cocaine with intent to distribute it, in violation of 18 U.S.C. 841(a)(1), and using or carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1).

c. A divided panel of the court of appeals affirmed, rejecting Bailey's claim that the evidence was insufficient to support his conviction under Section 924(c)(1). The court held that Bailey could be convicted for "us[ing] a firearm 'during and in relation to [a] * * * drug trafficking crime' " if the jury could reasonably infer that "the gun facilitated [Bailey's] commission of a drug trafficking offense." J.A. 21. The court explained that "[t]he trier of fact could reasonably infer that the money [in the trunk] was the proceeds of several already-completed drug transactions," J.A. 23, and that the gun in the trunk "had the purpose of protecting the cash in the trunk, and only slightly less obviously, had the purpose of protecting the drugs and money on Bailey's person," J.A. 27.

Judge Ginsburg dissented. J.A. 29-32. He stated that, if prior circuit precedent were not binding, he would "gladly join the majority in upholding the § 924(c) conviction." J.A. 32. But in his view, prior circuit precedent required reversal of Bailey's conviction. J.A. 30, 32.

2. a. On July 15, 1991, undercover officer Larry Hale of the District of Columbia Metropolitan Police Department approached petitioner Robinson's sister, Veloria, and said that he wished to purchase a quantity of crack cocaine. Veloria took the officer to a Northeast Washington apartment and knocked at the door. Petitioner Robinson responded to the knock and asked the undercover officer what he wanted. Officer Hale said he wanted a "20." He then observed Robinson retrieve a

rock of crack cocaine from the apartment's bedroom, which she sold him for $20 in marked money. J.A. 48; 1 *Robinson* Tr. 7.

The following evening, Officer Hale returned to petitioner Robinson's apartment and purchased cocaine from Kwarme Parker, who said that he lived in the apartment with her. J.A. 48-49; 1 *Robinson* Tr. 8-10. A half hour later, the police executed a search warrant at the apartment. Inside a locked trunk in a bedroom closet, the police found a .22 caliber pistol and holster, a tax return signed by Robinson, a letter from Robinson's employer, two plastic baggies containing cocaine, the $20 in marked money that the officer had given Robinson on the previous day, and $42.80 in other cash. Other documents in other parts of the bedroom, including a lease, confirmed that Robinson lived in the apartment. J.A. 49; 1 *Robinson* Tr. 35-39, 44.

b. At Robinson's trial, a narcotics detective testified that the cocaine in the locked trunk had a street value of $700 to $800 in its present form, or a $1,400 value if divided into $20 pieces. He explained that cocaine dealers use firearms to protect their enterprise from "stickup boys" who might attempt to rob them following a sale. In addition, they arm themselves to protect their turf from other drug gangs, lower level employees bent upon taking over a drug trafficking operation, or the police, should they try to close down the operation. The detective also testified that the .22 Derringer pistol found in petitioner Robinson's trunk was commonly known as a "second gun" that a drug dealer would hide on his person for use until he could reach his "real" gun, which would likely have greater firepower. J.A. 48, 81; 1 *Robinson* Tr. 77-79.

Testifying in her own behalf, Robinson acknowledged that she had leased the apartment and owned the trunk in which the narcotics and pistol were found. Although she also admitted that she knew that Parker was selling drugs, she disclaimed knowledge of the drugs or the pistol

found in her footlocker. J.A. 50. She also denied that she had been present in the apartment on the evening of July 15, when the first drug sale had taken place. 2 *Robinson* Tr. 129-130.

The district court denied Robinson's motion for a judgment of acquittal on the "uses or carries" count, ruling that the evidence was sufficient to establish a violation of Section 924(c)(1). J.A. 46. The court reasoned that the fact that Robinson's apartment "was a base for the distribution of crack cocaine permits the inference that the gun was used to facilitate the possession with intent to distribute." J.A. 45. In the district court's view, because "the jury could legitimately infer that [Robinson] had access to the gun in the trunk, and could use the gun to protect the stash of drugs and the proceeds of drug sales should the need arise," it did not matter that the trunk was kept locked. J.A. 45-46. The jury convicted Robinson of violating Section 924(c)(1). J.A. 82.

c. A divided panel of the court of appeals reversed Robinson's conviction on the Section 924(c) count. J.A. 47-61. The court determined that Robinson's "possession of this single, unloaded .22-caliber derringer found in a locked trunk in a bedroom closet falls significantly short of the type of evidence we have held to establish actual use under the statute." J.A. 55-56. In the court's view, "mere proximity of a gun to drugs is not * * * sufficient to support a conviction under section 924(c) in this circuit." J.A. 59-60.

Judge Henderson dissented. J.A. 61. In her view, the firearm facilitated Robinson's distribution of narcotics because it protected both her and the drugs during sale transactions. J.A. 70-71. In any event, she believed that the jury could reasonably find that the gun concealed in the apartment was used during and in relation to the ongoing offense of maintaining premises for the distribution of drugs. J.A. 72-74.

3. a. On rehearing en banc, the court of appeals affirmed the Section 924(c) convictions in both cases. J.A. 78-119. The majority rejected the multi-factor weighing approach previously employed by the circuit for determining the sufficiency of the evidence to support a Section 924(c)(1) conviction. The court noted that the prior approach improperly "invite[d]" the reviewing court to become "a second jury weighing the evidence anew and deciding whether or not we would vote to convict the defendant." J.A. 87. It also "produced widely divergent and seemingly contradictory results," J.A. 88, because it did not "yield[] determinate results in any but the easiest of cases," J.A. 89. Finally, the court stated that its prior approach conflicted with the approach followed by the other regional courts of appeals, which "have each adopted a definition of 'use' that is considerably broader than firing, displaying, or otherwise brandishing the firearm," J.A. 89-90, and each of which "focuses, in essence, upon whether the firearm was accessible and proximate to the defendant during the commission of the drug offense," J.A. 90.

In reformulating the test for sufficiency, the court stated that Section 924(c)(1) requires two showings: that the defendant "use[d]" the firearm and that the use was "during and in relation to a drug trafficking crime." The court rejected the view that "use" includes only "the paradigmatic uses of a gun, i.e., firing, brandishing, or displaying the gun during the commission of the predicate offense." J.A. 93. The court held that "one uses a gun, i.e., avails oneself of a gun, whenever * * * one puts or keeps the gun in a particular place from which one (or one's agent) can gain access to it if and when needed to facilitate a drug crime." J.A. 95. Since "possession with the intent to distribute is a continuing offense," the court held that "the government need only prove that the defendant put or kept the gun in that place at some point while the defendant illegally possessed the drugs." J.A. 95.

Second, the court clarified the requirement that the use of the gun had to be "in relation to a drug trafficking crime." The court found that this element is satisfied if the defendant "use[s] a gun to protect one's drugs, drug paraphernalia, or the proceeds of one's drug sales." J.A. 96.[1] Therefore, the court held, "positioning a firearm in such a way that it protects or is otherwise integrated into one's drug trafficking is not just a use of that gun, but is a use of that gun in relation to a drug trafficking offense." J.A. 98. The court concluded that there is sufficient evidence for a jury to find that the defendant has so positioned the firearm if "at some time during the commission of the predicate drug offense," the defendant "put or kept a firearm in a place where it would be proximate to and accessible from a place that is clearly connected to his drug trafficking (*e.g.*, a place used to store, manufacture, or distribute drugs, or to keep the proceeds of drug transactions)." J.A. 98. In such cases, the court concluded, the "jury may infer that the gun was being used to protect the drug trafficking operation, and was therefore being used in violation of § 924(c)(1)." J.A. 98.

Applying that standard, the court determined that in each case, the gun was sufficiently proximate to the drugs or narcotics proceeds and was accessible when the drugs or proceeds were being handled. The court held that the jury could therefore properly infer in each case that the defendant had placed the gun in that location in order to further the drug offenses or to protect the possession of the drugs, and that the gun had therefore been used "in relation to" a drug trafficking offense. J.A. 100-101.

b. Judge Wald filed a dissenting opinion. In her view, the court's previous multifactor test—requiring consideration of "the type of weapon involved, whether it was loaded, the presence of expert testimony to support the

[1] Apparently due to a printer's error, the Joint Appendix omits the words "drug paraphernalia, or the proceeds of one's" from the above quotation. See 36 F.3d at 115.

government's theory of 'use,' the proximity of the gun to the drugs, and the accessibility of the gun to the defendant," J.A. 102—provided a satisfactory standard for appellate review of Section 924(c)(1) convictions. J.A. 102-103. She stated that "[w]here evidence of ready access to a gun by the defendant guarding or distributing the drugs exists," the jury can infer "that such access is an intrinsic part of the criminal drug trafficking act." J.A. 105. But, under her view, the evidence would be insufficient to sustain a conviction for using a firearm where the defendant himself, at the time of his arrest, lacks ready access to the firearm. J.A. 106. Judge Wald concluded that there was sufficient evidence to sustain Bailey's conviction because his gun was accessible to him at the time he was arrested but insufficient evidence to sustain Robinson's conviction because "there was proof only of drugs and an unloaded gun in a locked trunk in a bedroom closet." *Ibid.*

Judge Williams, joined by Judges Silberman and Buckley, also dissented. Judge Williams disagreed with the position—which he conceded had been adopted by "all" of the regional courts of appeals—that a defendant can be convicted of violating Section 924(c)(1) "without evidence of the defendant's firing, brandishing, displaying or actively using the firearm in any way." J.A. 107. In his view, the term "uses" connotes "actual service from the weapon in completing an unlawful act," such as by firing it, intimidating opponents, displaying or brandishing it, or using it as an item of exchange. J.A. 110. Under that view, the term "uses" does not embrace the defendant's conduct in placing the gun near the drugs or proceeds to embolden the defendant or to protect his criminal activity, because that is not "active employment" of the gun. J.A. 116. Applying his view of the statute, Judge Williams would have reversed the convictions of both Bailey and Robinson. J.A. 119. Judge Silberman filed a brief separate dissent. J.A. 119.

SUMMARY OF ARGUMENT

Section 924(c)(1) is violated when a defendant "uses" a firearm "during and in relation to any * * * drug trafficking crime." Under the ordinary meaning of the term "use," which governs the construction of Section 924(c), a person "uses" an object when he avails himself of it or employs it to facilitate a goal he has in mind. Thus, a defendant who places a gun and drugs or proceeds in proximity to each other, to protect the drugs or drug proceeds and to embolden himself to commit a drug crime, has "used" the gun "during and in relation to" a drug trafficking offense. That construction of Section 924(c)(1) follows directly from the statute's plain language; it is the only construction that is consistent with this Court's reasoning in *Smith* v. *United States*, 113 S. Ct. 2050 (1993); and it has been accepted by every regional court of appeals.

Petitioners propose to limit the scope of the statutory term "use" to proscribe only what they call "active" uses of a weapon. Neither the statutory language, legislative history, nor past judicial construction, however, support any such limitation on the unqualified text of Section 924(c)(1). Congress did not say "active" use, and there is no basis for engrafting that limitation into the statute. In any event, the proposed addition of the adjective "active" to the term "use" does not assist petitioners: they certainly engaged in an "active" use when they strategically placed firearms near drugs and the proceeds of drug transactions to facilitate their drug dealing operations.

Since the placement of a weapon in such a way as to protect drugs and drug proceeds is a "use" of the weapon "in relation to" a drug trafficking crime, a conviction under Section 924(c)(1) must be sustained if a reasonable jury could find that the defendant engaged in that conduct. The court of appeals correctly held that a jury may reasonably draw that inference when the evidence

shows that the weapon was found proximate to the drugs or proceeds and accessible to the defendant when he was dealing with the drugs or proceeds. Of course, the jury need not draw that inference. But where evidence of proximity and accessibility exists, it is sufficient to support the inference, and the role of the reviewing court is at an end. Because the evidence in this case meets that standard, the Section 924(c)(1) convictions should be affirmed.

ARGUMENT

I. THE USE OF A FIREARM DURING AND IN RELATION TO A DRUG TRAFFICKING OFFENSE INCLUDES ITS EMPLOYMENT FOR PROTECTION OR SECURITY

A. The Language And Structure Of 18 U.S.C. 924(c) Embrace The Use Of A Firearm For The Purpose Of Safeguarding Or Otherwise Facilitating A Drug Trafficking Venture

Section 924(c)(1) provides that it is an offense to "use[]" a firearm "during and in relation to any * * * drug trafficking crime." Petitioners acknowledge that "firing, discharging, aiming, pointing, bludgeoning, trading, threatening with or brandishing, or displaying" a gun are all "uses" that the statute prohibits. Pet. Br. 11. But "use[]" in Section 924(c) is not confined to those actions; it is not a term of art that denotes a limited number of ways to employ a firearm to facilitate or advance a drug transaction. Rather, it is a general term, not defined in the statute, that must be given the full sweep of its "ordinary or natural meaning." *Smith* v. *United States*, 113 S. Ct. 2050, 2054 (1993) ("use[]" in Section 924(c)(1) includes use for barter as well as the more conventional use of a firearm, *i.e.*, as a weapon); see *Perrin* v. *United States*, 444 U.S. 37, 42 (1979).[2]

[2] The majority's holding in the court of appeals addresses the "uses" rather than the "carries" prong of Section 924(c)(1), and

The natural meaning of the term "use" includes a broad range of functions, including employment of a weapon for protection or security in the event it is needed. Every authoritative standard dictionary recognizes the breadth of the term "use." For example, in construing the same statute in *Smith* v. *United States*, this Court observed that "Webster's defines 'to use' as '[t]o convert to one's service' or 'to employ.'" 113 S. Ct. at 2054. A later edition of the same dictionary cited in *Smith* defines the verb "use" also to mean "to carry out a purpose or action by means of: make instrumental to an end or process: apply to advantage: turn to account." *Webster's Third New International Dictionary, Unabridged* 2524 (1986). Random House defines the term to mean "to employ for some purpose; put into service; make use of; to avail oneself of; apply to one's own purposes." *The Random House Dictionary of the English Language* 2097 (2d ed. unabridged 1987). See also *United States* v. *Rutherford*, 54 F.3d 370, 372 (7th Cir. 1995) ("use is defined as '[t]he act of employing a thing for any (esp. a profitable) purpose'"; quoting 19 *The Oxford English Dictionary* 350 (2d ed. 1989)). And, as the Court pointed out in *Smith*, see 113 S. Ct. at 2054, Black's Law Dictionary similarly defines "use" as "to make use of; to convert to one's service; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of." *Black's Law Dictionary* 1541 (6th ed. 1990).

All of those definitions share the idea of employing an object to serve a particular function or purpose.[3] A

the questions presented in the petitions for certiorari challenge that holding. We therefore confine our discussion to that issue.

[3] In a variety of circumstances, courts have long recognized that the "common meaning" of use is to "employ for the accomplishment of a purpose," *In re Fleshman's Estate*, 5 P.2d 727, 728 (Idaho 1931), or "to employ for any purpose," *Atlantic Nat'l Bank* v. *St. Louis Union Trust Co.*, 211 S.W.2d 2, 6 (Mo. 1948). See, *e.g.*, *Foote Mineral Co.* v. *Maryland Casualty Co.*, 173 F. Supp. 925, 929 (E.D. Tenn. 1959) ("[a]ct of employing anything"), aff'd, 277 F.2d 452 (6th Cir.), cert. denied, 364 U.S. 818 (1960); *Alexander* v. *Alexander*, 561 S.W.2d 59, 65 (Ark. 1978) (to "enjoy, hold, occupy, or have in some manner the benefit of"); *Whitaker* v. *Regents of the Univ. of Calif.*, 178 P. 308, 310 (Cal. Ct. App. 1918) ("to avail one's self of"); *Esfeld Trucking, Inc.* v. *Metropolitan Ins. Co.*, 392 P.2d 107, 110 (Kan. 1964) ("as a verb, [use] has a well-understood * * * legal significance, having been variously defined as * * * to avail one's self of, * * * hold, occupy, enjoy, or take the benefit of"); *Woodrich Construction Co.* v. *Indemnity Ins. Co.*, 89 N.W.2d 412, 418 (Minn. 1958) ("to avail one's self of"); *General Agric. Corp.* v. *Moore*, 534 P.2d 859, 863 (Mont. 1975) (refusing to limit constitutional provision regarding "existing right to use" surplus waters to "perfected or actual 'use'"); *State* v. *Place*, 582 A.2d 616, 618 (N.H. 1990) ("use" of lights includes defendant's "avail[ing] himself of their benefit"); *Beach* v. *Livingston*, 149 S.E.2d 328, 330 (S.C. 1966) ("to employ for any purpose, to employ for attainment of some purpose or end, * * * to put to one's use or benefit"); *State* v. *Douglas*, 16 N.W.2d 489, 494 (S.D. 1944) ("to avail one's self of, to employ, to put to a purpose").

defendant who avails himself of a gun to provide security for possession or distribution of drugs satisfies each of those definitions. As the court of appeals recognized, one important and long recognized use of a gun is to provide protection and security to the user. For example, "a gun placed in a drawer beside one's bed for fear of an intruder would, in common parlance, be a gun 'used' for domestic protection." J.A. 93-94. The fact that no intruder in fact appeared—or, to make the analogy to this case more precise, the fact that no intruder has been *shown* to have appeared—does not retroactively alter the fact that the individual has made use of the gun. Placing the gun in the drawer may provide the user with protection and security, and it may permit the user to sleep more soundly than otherwise, regardless of whether the user has any further need to handle, aim, or discharge the weapon.

In much the same way, a defendant may place a firearm near his drugs or drug proceeds, where it is accessible to him when he is handling the drugs or proceeds,

in order to protect them and to embolden himself to commit a drug trafficking offense. That action constitutes a "use" of the firearm in the ordinary sense. The defendant may have no need to use the firearm further to threaten or shoot at policemen, rival dealers, or dissatisfied customers. That, however, does not imply that the gun is not being "use[d]" to provide security for his commission of a drug trafficking offense. Section 924(c)(1) prohibits a variety of different uses, and only one use is required to support the statute's application.

B. This Court's Decision In *Smith* v. *United States* Also Refutes Petitioners' Narrow Theory Of The Meaning Of "Use"

This Court's decision in *Smith* v. *United States*, 113 S. Ct. 2050 (1993), makes clear that, contrary to petitioners' contention, the term "use" in Section 924(c)(1) should be given its full and ordinary meaning. The issue in *Smith* was whether a defendant who exchanged a gun for narcotics had "used" the gun under Section 924(c)(1). The Court explained that "Section 924(c)(1)'s language sweeps broadly, punishing any "us[e] of a firearm, so long as the use is 'during and in relation to' a drug trafficking offense." 113 S. Ct. at 2054. Accordingly, the Court "decline[d] to introduce [the] additional requirement" concerning the term "use" that the defendant urged, and held that the use of a gun in exchange for drugs violated the statute. *Ibid.*

The teaching of *Smith* is that the term "use" in Section 924(c) is a general term, and that it is not limited to a few, paradigmatic uses of a firearm, such as discharging, pointing, or brandishing. Instead, the term encompasses all instances in which a firearm is employed to facilitate a covered drug trafficking offense. In light of that principle, it follows *a fortiori* that when a defendant places a gun near drugs or proceeds to provide security

for the commission of a drug trafficking crime, he has "used" the gun within the meaning of the statute. Indeed, the Court in *Smith* reinforced that point in two ways of particular relevance here.

First, the Court in *Smith* recognized that it was not writing on a clean slate, and that the term "use" had long received a broad judicial construction. Thus, the Court cited *Astor* v. *Merritt*, 111 U.S. 202 (1884), for the proposition that "use" means " 'to employ' or 'to derive service from.' " See *Smith*, 113 S. Ct. at 2054. *Astor* itself involved a customs statute exempting from duty "wearing apparel in actual use," and this Court held that "unworn wearing apparel, purchased [by an individual for his use or that of his family] for an approaching season," was "in actual use." 111 U.S. at 203. The fact that the apparel had not actually been worn was not dispositive. As the Court in *Astor* explained:

> [a] article of wearing apparel * * * [that is] placed in with, and as a part of, what is called a person's wardrobe, is, in common parlance, in use, in actual use, in present use, in real use, as well before it is worn as while it is being worn or afterwards.

Id. at 214. The same principle applies to firearms "placed in with, and as a part of" a defendant's drugs or proceeds.

Second, the Court in *Smith* explained that "§ 924(c)(1)'s language sweeps broadly," and it cited with approval (see 113 S. Ct. at 2054) the opinion of the D.C. Circuit in *United States* v. *Long*, 905 F.2d 1572 (Thomas, J.), cert. denied, 498 U.S. 948 (1990). The D.C. Circuit in that case observed that "the word 'use' is expansive," *id.* at 1577, and that "a defendant can 'use' a firearm without actively employing it," *id.* at 1576. That position squarely rejects petitioners' theory that the term "use" in the statute refers only to a subset of what would ordinarily be considered uses, and it directly contradicts petitioners' contention that "[u]se

under Section 924(c) means the *active employment* of a firearm." Pet. Br. 11 (emphasis added).

C. The Regional Courts of Appeals Have Held That Employment Of A Firearm To Provide Security For A Drug Trafficking Offense Is A Use Prohibited By Section 924(c)

The experience of the regional courts of appeals confirms that, even if a firearm is concealed or out of the drug dealer's reach, its strategic placement to protect a drug operation and to embolden a defendant is a "use" prohibited by Section 924(c)(1).[4] A leading case is *United States* v. *Stewart*, 779 F.2d 538, 540 (9th Cir. 1985) (Kennedy, J.). In that case, the Ninth Circuit noted that "the evident purpose of the statute was to impose more severe sanctions where firearms facilitated, or had the potential of facilitating, the commission of a felony." *Id.* at 540. The court explained:

> If the firearm is within the possession or control of a person who commits an underlying crime as defined by the statute, and the circumstances of the case show that the firearm facilitated or had a role in the crime, such as emboldening an actor who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others, whether or not such display or discharge in fact occurred, then there is a violation of the statute.

Ibid. Accord *United States* v. *Torres-Rodriguez*, 930 F.2d 1375, 1385 (9th Cir. 1991); *United States* v. *Mason*, 658 F.2d 1263, 1270-1271 (9th Cir. 1981) (Kennedy, J.). As the First Circuit stated, "the question is whether

[4] Even the principal dissenting opinion below recognized that "all" of the courts of appeals affirm convictions under Section 924(c)(1) without proof of what the dissenting judge termed "actively using the firearm in any way." J.A. 107. The majority agreed. See J.A. 90-92.

placement of the weapon was designed to facilitate the narcotics enterprise, by, say, protecting against untoward contingencies or safeguarding the cache of drugs. * * * Indeed, so long as one purpose in situating the weapon nearby was to protect the narcotics enterprise, that need not have been defendant's sole purpose." *United States* v. *Hadfield*, 918 F.2d 987, 998 (1st Cir. 1990), cert. denied, 500 U.S. 936 (1991).[5]

[5] Accord *United States* v. *Fermin*, 32 F.3d 674, 678 (2d Cir. 1994) ("This Circuit will sustain a section 924(c) conviction if the evidence shows that the defendant strategically placed a weapon so as to enable ready access to it during a drug transaction."), cert. denied, 115 S. Ct. 1145 (1995); *United States* v. *Theodoropoulos*, 866 F.2d 587, 596-597 (3d Cir. 1989) ("presence in plain view of a loaded firearm * * * is evidence that the conspirators may have felt some need for security from which a jury could infer that the weapon was an integral part of the conspiracy and was 'used' therein"); *United States* v. *Paz*, 927 F.2d 176, 179 (4th Cir. 1991) ("it is enough if the firearm is present for protection and to facilitate the likelihood of success"); *United States* v. *Pace*, 10 F.3d 1106, 1121 (5th Cir. 1993) (Section 924(c) requires proof that the firearm "facilitated" the drug trafficking offense, and "the concepts encompassed by the word 'facilitate' include[] availability to provide protection"), cert. denied, 114 S. Ct. 2180 (1994); *United States* v. *Wilson*, 27 F.3d 1126, 1132 (6th Cir.) (evidence sufficient "if the possessor of a weapon intended to have it available for possible use during or immediately following the transaction by lending courage to the possessor"), cert. denied, 115 S. Ct. 452 (1994); *United States* v. *Vasquez*, 909 F.2d 235, 240 (7th Cir. 1990) ("The trier of fact could reasonably conclude that the availability of firearms instilled [the defendant] with a heightened sense of security while he possessed the drugs with the intent to distribute them."), cert. denied, 501 U.S. 1217 (1991); *United States* v. *Matra*, 841 F.2d 837, 842 (8th Cir. 1988) ("Just as weapons are kept at the ready to protect military installations against potential enemy attack, so too may weapons be kept at the ready to protect a drug house, thereby safeguarding and facilitating illegal transactions."); *United States* v. *McKinnell*, 888 F.2d 669, 675 (10th Cir. 1989) ("use" element satisfied if "the firearm formed an integral part of [the defendant's] criminal undertaking by providing a means of protecting his operation and intimidating those encountered in the course of drug transactions"); *United*

Even when courts of appeals have found, in particular cases, that the jury could not reasonably infer that a firearm was used to protect a drug operation and to embolden a defendant, they have expressed the understanding that "use" includes placement of a weapon for the purpose of protecting drugs or proceeds. For example, the Second Circuit in *United States* v. *Feliz-Cordero*, 859 F.2d 250 (2d Cir. 1988), reversed a conviction of a defendant whose gun was found in the bedroom dresser drawer of an apartment that elsewhere contained drug paraphernalia. The court nonetheless recognized that a firearm that "was strategically located so as to be quickly and easily available for use during [a drug] transaction" would "come within the 'uses' provision of section 924(c)." 859 F.2d at 254. Compare *United States* v. *McFadden*, 13 F.3d 463, 468 (1st Cir. 1994) (Breyer, J., dissenting) (discussing use of "the guns *for protection* of the drugs, thereby 'facilitat[ing]' the drug crime").

II. PETITIONERS' THEORY OF "ACTIVE" USE IS INTERNALLY INCONSISTENT AND IS NOT SUPPORTED BY THE STRUCTURE OF THE STATUTE OR ITS LEGISLATIVE HISTORY

A. Section 924(c) Is Not Limited To "Active" Uses

Petitioners repeatedly argue that Section 924(c) penalizes only those who "*actively* employ a firearm to carry out the predicate offense." Pet. Br. 13 (emphasis added); see also, *e.g.*, *id.* at 11 ("active employment of a firearm"), 14 ("active employment"), 15 ("definitions suggest action or activity," "active employment"), 16 ("active employment"), 17 ("actively employed"), 19 ("[*a*]*ctive* employment"). They then argue that such employment

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States v. *Poole*, 878 F.2d 1389, 1393 (11th Cir. 1989) ("use" element satisfied because the jury could have concluded that guns found near drugs "were used to protect the [drug traffickers] and the cocaine," even where there was no evidence that the guns were fired, brandished, or displayed).

"includes firing, discharging, aiming, pointing, bludgeoning, trading, threatening with or brandishing, or displaying," and that "[i]t may also include referring to the gun." Pet. Br. 11. According to petitioners, "[u]se normally requires that the defendant handle the firearm or be aware of use of the weapon by others involved in the predicate offense." Pet. Br. 11.

The text of Section 924(c)(1) does not include the term "active" or any of its variants. Nor is there any basis for engrafting an "active" requirement onto the clear and unqualified statutory text. Indeed, that is precisely the lesson of *Smith*, where the core of the defendant's argument was that the term "uses" in the statute must be understood to include the further requirement of use "as a weapon." The Court in *Smith*, "decline[d] to introduce that additional requirement." 113 S. Ct. at 2054.

In any event, even if the statute included an additional requirement of "active" use, it would not assist petitioners. Any principled application of that requirement would include the conduct of a defendant who deliberately and "actively" places a firearm proximate to drugs or proceeds. There is nothing "passive" about a defendant's positioning of a gun to make it available to provide security for his drug trafficking crimes, or, for that matter, moving drugs right next to a gun for the same purpose. Both actions create the volatile mixture at which Section 924(c)(1) is aimed: the use of firearms in connection with drug trafficking, with the consequent enhanced risk of violence.

Nor would the result change under petitioners' alternative requirement "that the defendant handle the firearm." Once again, that requirement is not found in the statute itself. Petitioners themselves state only that it is "normally" required, not that it is an essential element of the offense. Pet. Br. 11. Moreover, petitioners also concede that a defendant who "refer[s] to the gun" may violate

the statute "if such action assists in the accomplishment of the offense." Pet. Br. 11. A defendant convicted on that basis may or may not have "handled" the gun. Finally, even if handling the gun were required, a defendant who is using a gun to provide security for his commission of a drug trafficking offense will ordinarily have handled the firearm when placing it proximate to the drugs or drug proceeds.

In short, petitioners are left with a construction of the statute that limits the prohibited uses to conduct that involves discharging a gun, threatening someone with it, or exchanging it for drugs. That construction is inconsistent with the broad and unqualified employment of the term "use" in the statute.

B. The Structure Of Section 924(c)(1) And Related Provisions Provides No Support For Petitioners' Argument

Petitioners argue (Pet. Br. 15-21) that the statute must be interpreted as they urge, because the structure of Section 924(c)(1) and its surrounding provisions requires that construction. A close examination of the statute, however, undermines that contention.

At the outset, petitioners' construction would defeat one of Section 924(c)(1)'s key applications. If the term "uses" were confined to acts such as firing, brandishing, or trading a firearm, it would become virtually a dead letter in the context of many of the drug trafficking crimes to which it expressly applies. See 18 U.S.C. 924(c)(2). As the court below observed (J.A. 95 n.1), many such offenses, particularly those involving possession of drugs, "are furtive crimes" and "[s]tealth is essential to their success." J.A. 95 n.1. As a general matter, guns are used in violent crimes as instrumentalities of the offense—*e.g.*, the use of a gun to murder a suspected witness, see 18 U.S.C. 1512(a). But the firearms ordinarily play a

somewhat different role in drug trafficking offenses, and in particular in possessory drug offenses. Aside from the relatively rare "trading" cases, such as *Smith*, their ordinary role in such offenses is to facilitate the illicit venture by providing security to the dealer. To eliminate that use from the statute would severely limit its application to drug trafficking crimes.

1. Petitioners observe (Pet. Br. 15) that Section 924(c)(1) requires a mandatory consecutive term for any crime of violence or drug trafficking crime, including one "which provides for an enhanced punishment if committed *by the use of a deadly or dangerous weapon.*" 18 U.S.C. 924(c)(1) (emphasis added). They maintain that the italicized phrase "conveys the unmistakable suggestion of active employment," Pet. Br. 15, and that the same interpretation should be given to the term "use[]" as it appears in the basic statutory proscription of "use" "during and in relation to" a predicate offense.

The meaning of the phrase "by the use of a deadly or dangerous weapon" is not a reliable guide for determining the reach of the different phrase "uses during and in relation to," which is at issue in this case. The phrase "committed by the use of a deadly or dangerous weapon" may suggest an "active use" requirement because the words "committed by" may imply the use of the weapon as the means or instrumentality of committing the offense. By contrast, the basic statutory proscription of "us[ing] [a firearm] during and in relation to" the underlying offense naturally applies to conduct in which the firearm "facilitat[ed] or ha[d] the potential of facilitating" the offense. See *Smith*, 113 S. Ct. at 2059.[6] A firearm may

[6] Indeed, this Court has construed the phrase "in relation to" as a "deliberately expansive" phrase in both *Smith*, see 113 S. Ct. at 2058, and in other similar contexts. See *e.g.*, *District of Columbia* v. *Greater Washington Board of Trade*, 113 S. Ct. 580, 583 (1992). Contrary to petitioners' contention (Pet. Br. 40 n.22), nothing in *New York State Conference of Blue Cross &*

"facilitate" an offense by emboldening the defendant or protecting the drug operation, "whether or not * * * display or discharge in fact occurred." *Stewart*, 779 F.2d at 540.

The origins of the phrase "by the use of a deadly or dangerous weapon" explain why it does not bear on the issue in this case. The phrase was added in 1984 in response to this Court's holdings in *Simpson* v. *United States*, 435 U.S. 6 (1978), and *Busic* v. *United States*, 446 U.S. 398 (1980), that Section 924(c) is inapplicable when the underlying offense provided its own enhancement provision for use of a dangerous weapon in the commission of the offense. The 1984 amendment made clear that the mandatory consecutive sentence of Section 924(c) does apply to crimes such as armed bank robbery and assault on federal officers, in which an enhanced sentence is already authorized by statute for use of a dangerous weapon in the commission of the offense. See S. Rep. No. 225, 98th Cong., 1st Sess. 312-313 (1983). Both of the predicate crimes identified in the Senate Report as warranting the clarifying language in Section 924(c)(1) include explicit enhancement provisions for the use of a dangerous weapon in an assault. See 18 U.S.C. 2113(d) (enhanced penalty for assaulting or putting in jeopardy the life of any person "by the use of a dangerous weapon or device"); 18 U.S.C. 111(b) (enhancement for "[w]hoever, in the commission of [an assault on a federal officer], uses a deadly or dangerous weapon"). Thus, the "committed by" amendment was intended to refer to those other specific statutes; it does not, and was not intended to, track the basic prohibition of Section 924(c).

2. Petitioners also argue (Pet. Br. 15-18) that a construction of the term "uses" that embraces employment of a firearm to provide security to a defendant committing

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Blue Shield Plans v. *Travelers Ins. Co.*, 115 S. Ct. 1671, 1677 (1995), suggests to the contrary.

a drug trafficking offense "renders superfluous" the alternative way in which the statute can be violated—by "carry[ing]" a firearm. In their view, confining the term "use" to "active employment" of a firearm is necessary to provide an independent scope to "carry[ing]" liability. Cf. *United States Department of Treasury* v. *Fabe*, 113 S. Ct. 2202, 2209-2210 & n.6 (1993) (noting canon of construction that each word of a statute must be given some effect).

Initially, virtually every example petitioners give (Pet. Br. 13, 15) to illustrate their understanding of the "active" use of a firearm—*e.g.*, firing, pointing, bludgeoning with, threatening, brandishing, displaying, and even trading a firearm—also ordinarily involves "carry[ing]" a firearm during and in relation to the predicate crime. Thus, even under petitioners' unduly narrow interpretation of the statute, the terms have a virtually complete overlap.[7]

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[7] Petitioners (Pet. Br. 18) and the dissenters below (J.A. 114-115) note that, in commenting on Section 924(c) in our brief in *McLaughlin* v. *United States*, 476 U.S. 16 (1986), we observed that "[i]t appears that Congress is of the view that something more than the carrying of a gun is required to establish its use." We also explained that Section 2113(d), which imposes additional penalties for bank robbery committed "by the use of a dangerous weapon or device," would not cover an armed robber who "approaches a bank teller and demands money without displaying a weapon, because "the robber has not 'used' the weapon to 'assault' anyone, as Section 2113(d) requires." See No. 85-5189 Gov't Br. at 19 n.18, citing S. Rep. No. 225, *supra*, at 314 n.10.

Neither of these observations, however, is inconsistent with our position in this case. Although, in the context of drug trafficking crimes, physical custody of a firearm may under some circumstances be sufficient to establish a violation of both the "uses" and "carries" prongs of the Section, the former offense requires not only proof of possession, but also that the firearm was being employed in some manner to facilitate commission of the predicate crime, such as by emboldening the defendant or furnishing protection to the trafficking operation. Our acknowledgement that under Section 2113(d) an actual assault with a dangerous weapon is

Moreover, in view of the manner in which Section 924(c)(1) evolved into its present form, the canon of construction that, in enacting a statute, "a legislature is presumed to have used no superfluous words," (*Platt* v. *Union Pac. R.R.*, 99 U.S. 48, 58 (1879)), loses much of its force. As we explain in greater detail below, see pp. 27-30, *infra*, Section 924(c) as originally enacted contained two distinct prohibitions. The first subsection prohibited "us[ing] a firearm *to commit any felony* which may be prosecuted in a court of the United States." The second subsection separately prohibited "carr[ying] a firearm *unlawfully during the commission of any felony* which may be prosecuted in a court of the United States." See 82 Stat. 1224 (emphasis added). Under that formulation, "use" and "carry" liability were fundamentally different from each other and from liability under the current statute. "Use" liability required proof that the gun was "use[d] to commit" the predicate offense. "Carry" liability required proof that the gun was "carried unlawfully"; the only required relationship to the predicate offense was temporal ("during").

In 1984, Section 924(c) was amended to delete the "unlawfully requirement (see 98 Stat. 2138-2139), to merge the two alternative ways in which the statute could be violated, and to add the "during and in relation to" element. That amendment divested the terms "uses" and "carries" of the qualifications ("to commit" and "unlawfully during") that gave them distinct connotations. Thenceforth, under either our construction or that of

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necessary has no bearing upon the connotation of the term "uses" as it appears in Section 924(c)(1). As explained, the former statute expressly requires that, in committing or attempting to commit a bank robbery, the defendant must "*assault*[] *any person, or put*[] *in jeopardy the life of any person* by the use of a dangerous weapon or device." 18 U.S.C. 2113(d) (emphasis added). No similar qualifying language applies to the "uses" prong of Section 924(c)(1).

petitioners, the terms "uses" and "carries" largely overlap. The convergence of the two terms, however, is a function of the statute's evolution. In light of that history, Congress's retention of both bases of liability is not a reason for imposing an artificially distinct and limited meaning on the term "uses," with the effect of narrowing the statute's coverage.[8]

3. Petitioners argue (Pet. Br. 19-21) that it is significant that 18 U.S.C. 924(d)(1) permits forfeiture both of weapons that are "used" and those that are "intended to be used." In their view, a firearm employed for security purposes—to protect the drugs or proceeds and to embolden the defendant—is a gun that is "intended to be used," but not one that is "used." Since Section 924(c)(1) prohibits the "use" of a firearm, petitioners argue that its employment for security is not covered. We agree that Section 924(c)(1) must be construed in light of the forfeiture provisions in Section 924(d), see *Smith*, 113 S. Ct. at 2056-2058, but petitioners' analysis of the forfeiture provisions is incorrect.

The forfeiture provisions of Section 924(d) reach both future uses of firearms during the course of ongoing offenses and intended uses of firearms in future offenses. For example, forfeiture under Section 924(d)(3)(C) applies to the use or intended use of firearms in the offense of shipping a firearm while engaged in the business of unlicensed dealing in firearms (18 U.S.C. 922(a)(1)),

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[8] Petitioners also urge (Pet. Br. 17) that it is unlikely that Congress would have intended a defendant to be punished with equal severity for both bearing a firearm on his person so that it is within his easy reach and for situating a firearm near drugs so that it is accessible from that location. To the contrary, there is no reason why Congress would have distinguished keeping a gun available on one's person for possible employment (carrying the firearm) and keeping it within reach for such a purpose (using the firearm). Both increase the possibility that a gun will be fired —and that someone will be injured or killed—in the course of the criminal offense.

transporting a firearm without a license (18 U.S.C. 922 (a)(3)), and selling a firearm to an unlicensed nonresident (18 U.S.C. 922(a)(5)). A firearm shipped, transported, or sold in violation of those provisions would be "used" in the commission of such an offense. But a firearm stockpiled by the offender while awaiting shipment, transportation, or sale during either an ongoing illicit firearms enterprise or a planned future enterprise would be one "intended to be used" in the commission of a future crime. See *United States* v. *One Assortment of Seven Firearms*, 632 F.2d 1276, 1278-1279 (5th Cir. 1980). The terms "used" and "intended to be used" thus apply to different classes of firearms. Congress therefore had reason to employ both terms in defining the classes of property subject to forfeiture.

In contrast, Section 924(c) requires actual (not future) commission of the predicate crime and actual (not future) use of the firearm in relation to that offense. For example, if a drug dealer purchased a firearm for the purpose of protecting his future drug operations, but was presently storing the firearm at a remote and inaccessible location, that firearm would be subject to forfeiture under Section 924(d), although it would not be the basis for a prosecution under Section 924(c). The inclusion of the phrase "intended to be used" in Section 924(d) therefore provides no basis for construing the term "use" in Section 924(c) to exclude employment of a firearm for security purposes.

C. The Legislative History Of Section 924(c) Lends No Support To Petitioners' Narrow Construction Of The Term "Uses"

As we have explained, the ordinary meaning of the term "uses" includes the employment of a firearm to protect a drug trafficking operation. Petitioners maintain (Pet. Br. 22) that, despite the breadth of that term, the legislative history of Section 924(c) demonstrates that

Congress intended it to apply only where a firearm is discharged, used to threaten someone, or offered as a medium of exchange. As the Court has repeatedly explained, however, "[a]bsent a clearly expressed legislative intention to the contrary, the words of the statute are conclusive." *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 28 (1989), quoting *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1990). In such instances, the " 'sole function of the courts is to enforce [the statute] according to its terms.' " *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989), quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917). In this case, "[n]othing in the legislative history of [Section 924(c)] militates against honoring the plain language of the [statute]. Nor is this one of the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' " *Hallstrom*, 493 U.S. at 28, quoting *Ron Pair Enterprises, Inc.*, 489 U.S. at 242.

1. When it was originally enacted as part of the Gun Control Act of 1968, Section 924(c) imposed mandatory sentences on anyone who "(1) uses a firearm to commit any felony which may be prosecuted in a court of the United States" or "(2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States." The proposal that became Section 924(c) was introduced by Representative Poff as a floor amendment to H.R. 17735, then known as the Firearms Control Assistance Act of 1968. 114 Cong. Rec. 22,231 (1968); see *Simpson* v. *United States*, 435 U.S. at 13-14. In introducing his amendment, Representative Poff explained that the purpose of the mandatory minimum sentence it authorized was "to persuade the man who is tempted to commit a Federal felony to leave his gun at home. Any such person should understand that if he uses his gun and is caught and convicted, he is going to jail." 114 Cong. Rec. 22,231 (1968).

In making that statement, Representative Poff was not referring to the "carries" prong of the original Section 924(c). As originally enacted, the "carries" prong of the statute prohibited only the "unlawful" carrying of a firearm while committing an offense. The statute would thus not have applied to an individual who, for instance, had a permit for carrying a gun and carried it with him when committing an offense, and it would have had no force in "persuading" such an individual "to leave his gun at home." Instead, Representative Poff was referring to the "uses" prong of the original Section 924(c). His statement strongly suggests that the "uses" prong was intended to reach anyone who commits a federal felony and does not "leave his gun at home," *i.e.*, who arms himself for the purpose of committing a federal offense, regardless of whether he actually fires or brandishes the weapon or instead employs it in some other manner to facilitate the offense. Because Representative Poff was the sponsor of the legislation as ultimately enacted, "it is therefore reasonable to assume that [his remarks] represented the understanding of the Congressmen who voted for the proposal." *Busic* v. *United States*, 446 U.S. 398, 406 (1980).

Petitioners argue that, during the floor debates, other members of Congress made statements that are said to support an understanding that Section 924(c) required "active" employment of a firearm. Pet. Br. 24. Even if isolated statements of individual Members carried significant weight in interpreting the statute, the quoted statements would not support petitioners' conclusion. For example, Represenative Casey observed that, if the draft legislation omitted the term "carriers," it would "apply only to those who actually use a gun in the commission of the offenses enumerated." 114 Cong. Rec. 22,229-22,230 (1968). That statement is consistent with our position; "actual use" of a firearm to protect drugs or proceeds or to embolden the defendant is essential for conviction

under Section 924(c) under our view. In any event, Representative Casey's remarks were directed toward an amendment of his own that would have prohibited the "use" of a firearm "during the commission of any robbery, assault, murder, rape, burglary, kidnaping, or homicide (other than involuntary manslaughter)," and would thus not have included drug trafficking. 114 Cong. Rec. 22,229 (1968). Accordingly, his comment was addressed to the use of a gun in a crime of violence, and there was no reason to think that it illuminated the application of the statute as enacted to other crimes.[9]

2. a. As part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1005(a), 98 Stat. 2138-2139, Congress revised Section 924(c) in several respects. In particular, Congress substituted the phrase "crime of violence" for the term "felony" in order to include violent misdemeanors and to exclude non-violent felonies. See S. Rep. No. 225, 98th Cong., 2d Sess. 313 n.9 (1983). Additionally, as noted above, Congress merged the "uses" and "carries" prongs of the statute, deleted the requirements that the firearm be used "to commit" the offense or the weapon be carried "unlawfully," and imposed instead the "during and in relation to" requirement with respect to both "uses" and "carries" liability.[10] Congress's action suggests an expansive under-

[9] Similarly, the remark of Representative Dowdy that "exhibiting [a gun] would be using the gun in the commission of a crime" (114 Cong. Rec. 22,235) and the comment of Representative Harsha that the legislation required "actual use" of a firearm (114 Cong. Rec. 22,234) do not support petitioners' position and in any event were made in connection with the rejected Casey amendment.

[10] The 1984 amendment to Section 924(c) read in pertinent part as follows:

> Whoever, during and in relation to any crime of violence, including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in

standing of "uses" liability, including all "uses" that coincide with and relate to the predicate crime, even if they are not the direct means of its commission.

The 1984 amendment also made clear that Section 924(c)'s mandatory minimum sentence applied to any crime of violence, including crimes carrying their own enhanced punishment if committed by means of a dangerous weapon, and was to be served before the sentence for the underlying offense. In a footnote immediately following its explanation of the enhanced sentencing provision, the Committee Report observed:

> Evidence that the defendant had a gun in his pocket but did not display it, or refer to it, could nevertheless support a conviction for "carrying" a firearm in relation to the crime if from the circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make his escape. The requirement in the present section 924(c) that the gun be carried unlawfully, a fact usually proven by showing that the defendant was in violation of a State or local law, has been eliminated as unnecessary. * * * Moreover, the requirement that the firearm's use or possession be "in relation to" the crime would preclude its application in a situation where its presence played no part in the crime, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight.

S. Rep. No. 225, *supra*, at 314 n.10. Petitioners maintain (Pet. Br. 27) that part of the first sentence of the footnote ("if from the circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make his escape") "strongly suggests that Congress believed that 'use' of a firearm consists of actions such as firing, displaying, or referring to the weapons during the predicate offense."

addition to the punishment provided for such crime of violence, be sentenced to imprisonment for five years.

The language on which petitioners rely does not support their argument. It discusses only the scope of liability under the "carries" prong of the statute; it does not purport to explain or comment on the scope of the term "uses." In fact, the only portion of the footnote that addresses the term "uses" is the final sentence, which states that liability would be inappropriate "in a situation where [the gun's] presence played no part in the crime, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight." The clear import of that statement is that Congress contemplated that the amended statute would apply when firearms "played [a] part in the crime," by being used to protect or to embolden the defendant. See *United States* v. *Phelps*, 895 F.2d 1281, 1283-1284 (9th Cir. 1990) (Kozinski, J., dissenting from denial of rehearing en banc).

Finaily, petitioners argue (Pet. Br. 29) that the Report's specific mention of particular uses of guns means that the statute as enacted was limited to those uses.[11] The amended statute, however, applied only to crimes of violence, and it was therefore to be expected that the examples given in the Report would be of typical uses of a gun in such crimes. Moreover, the examples given were not intended to be generally representative of the application of the statute. Rather, they were offered to explain the operation of the new provision requiring consecutive sentences to those that would be imposed under a burglary statute. See S. Rep. No. 225, *supra*, at 313-314. In any event, the only theory on which this passage could conceivably be relevant to interpretation of the

[11] Petitioners refer (Pet. Br. 29) to the Report's statement that "[f]or example, a person convicted of armed bank robbery in violation of section 2113(a) and of using a gun in its commission (for example by pointing it at a teller or otherwise displaying it whether or not it is fired) would have to serve five years * * * before his sentence for the conviction under section 2113(a) and (d) could start to run." S. Rep. No. 225, *supra*, at 313-314.

present version of Section 924(c) has long been discredited. As this Court has repeatedly explained, "[i]t is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history." *Pittston Coal Group* v. *Stebben*, 488 U.S. 105, 115 (1988); see, *e.g.*, *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980); *Standefer* v. *United States*, 447 U.S. 10, 20 n.12 (1980). Indeed, that principle underlay this Court's decision in *Smith*; the fact that the legislative history contained no reference to the use of guns in barter transactions and that the Congress that originally enacted the statute had more paradigmatic uses of guns expressly in mind were rejected as bases to limit the scope of the statute. See 113 S. Ct. at 2058. The same result follows *a fortiori* here.

b. The construction of the 1984 amendments must also be informed by the principle that when Congress reenacts legislation that has been subject to a "settled judicial construction," the courts will "apply the presumption that Congress was aware of these earlier judicial interpretations and, in effect, adopted them." *Keene Corp.* v. *United States*, 113 S. Ct. 2035, 2043 (1993) (collecting cases); *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978); *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975). By 1984, the term "uses" in Section 924(c) had been uniformly construed to embrace any employment of a firearm to facilitate the commission of a federal felony, including the sorts of uses for protection that are at issue in this case.[12]

For example, in *United States* v. *Grant*, 545 F.2d 1309, 1312-1313 (2d Cir. 1976), cert. denied, 429 U.S.

[12] See, *e.g.*, *United States* v. *LaGuardia*, 774 F.2d 317, 321 (8th Cir. 1985) ("use" of a firearm includes employment to protect drugs and proceeds); *United States* v. *Mason*, 658 F.2d 1263, 1270-1271 (9th Cir. 1981) (Kennedy, J.) (affirming Section 924(c) conviction although gun "was holstered and * * * never brandished or displayed").

1103 (1977), the Second Circuit rejected the defendant's claim that he could not be convicted for "using" a number of guns that were found alongside drugs. The court held that "the evidence"—which consisted of the juxtaposition of weapons and drugs—"established that [the defendant] used the guns as part of a tight security operation to protect large quantities of cocaine and hence to commit the felony of possessing cocaine with intent to distribute it." 545 F.2d at 1312. Similarly, in a non-drug context in *United States* v. *Moore*, 580 F.2d 360, (9th Cir. 1978), cert. denied, 439 U.S. 970 (1979), a defendant who had a gun concealed in the waistband of his trousers was arrested on his way to rob a bank. *Id.* at 362. The Ninth Circuit affirmed his conviction for "us[ing]" a firearm in violation of Section 924(c), holding that "[t]he fact that [the defendant] never had an opportunity to brandish or discharge his gun does not mean that he did not 'use' it." The Ninth Circuit explained that the gun could form the basis of "using" liability, because the gun, like the gloves and ski mask he was wearing, "increased the likelihood of success; without them he probably would not have sallied forth." 580 F.2d at 362.

Neither in 1984, when Congress first significantly amended the language of Section 924(c), nor in 1986 and 1988, when Congress again amended the statute, did Congress give any indication that it "disagreed" with the results or reasoning in those cases. See *Reno* v. *Koray*, 115 S. Ct. 2021, 2026 (1995). To the contrary, by replacing the pre-1984 "uses to commit" standard with the "uses during and in relation to" provision, Congress indicated that it wanted a broader, not narrower basis for "uses" liability under the statute. Petitioners' suggestion that Congress intended somehow to narrow the scope of the term "uses"—and to reject the consistent views of the courts of appeals—is unfounded.

3. In 1986, as part of the Firearms Owners' Protection Act (FOPA), Pub. L. No. 99-308, § 104, 100 Stat.

457, Congress further amended Section 924(c)(1), *inter alia*, by inserting the phrase "or drug trafficking crime" after the phrase "crime of violence." See 100 Stat. 457. The House Judiciary Committee's report on FOPA explained that a principal purpose of the legislation was to "[p]rovide an important new weapon against narcotics traffickers" and to "protect[] * * * law enforcement officers from the proliferation of machine guns and high-powered 'assault-type' weapons that are increasingly being used by criminals." H.R. Rep. No. 495, 99th Cong., 2d Sess. 2, 7 (1986).

Despite that broad expression of purpose, petitioners contend (Pet. Br. 30-31) that a portion of the House Report, rejecting a self-defense provision that had been included in another version of the legislation, suggests that Congress did not intend the term "uses" to embrace employing a firearm for protection. In view of Congress's rejection of the self-defense provision and the well-recognized hazards of looking to the views of a subsequent Congress to interpret a previously enacted term, see, *e.g.*, *United States* v. *Price*, 361 U.S. 304, 313 (1960), the House Report is a weak basis for construing the term "uses." In any event, the passage on which petitioners rely does not support their argument.

The Report states that a defendant generally may not rely on a self-defense claim where the defendant was protecting himself from a danger caused by his commission of the crime. The report then comments that this limitation "may rule out a successful self-defense claim in most situations in which the *use* branch of the offense forms the basis of the" Section 924(c) liability. H.R. Rep. No. 495, *supra*, at 10. It further observes (*ibid.*) that, if the proposed defense were adopted:

> the "carrying" branch of the offense might be decimated, in that the felon could claim that he was only carrying the weapon for defense, and cite the fact that he did not actually *use* the weapon as proof

> of his claim. For example, a drug trafficker, if charged with carrying a firearm under 18 U.S.C. 924(c) in connection with drug trafficking, might be able to reasonably sustain a claim that it was carried for protection against rival traffickers.

The purpose of that passage was to address a proposed self-defense amendment to the statute, not to define the contours of the term "uses." The reference to the unavailability of the self-defense exception in "most" situations involving the "use" prong of the statute is entirely accurate, under any reading of the statute: a defendant who places a gun next to drugs or proceeds for protection of his criminal enterprise surely cannot claim that he was using it for self-defense, just as—in the Committee's terms—"a felon who *uses* a gun in the commission of a felony or in a shoot out with police while fleeing cannot * * * claim self-defense." Nor can petitioners derive support from the Report's guarded observation that, under the proposed defense, a defendant who "did not actually *use*" a weapon he was carrying "*might* reasonably be able to sustain the claim that it was carried for protection against rival traffickers" (second emphasis added). In context, it is clear that the Committee intended the term "actually use" to refer to the firing or discharge of the weapon; yet neither the dissenting opinion below nor petitioners would argue that the term "use" is limited to instances where a weapon is fired.

4. As part of the Anti-Drug Abuse Act of 1988, Congress further amended Section 924(c). On that occasion, Congress added a new paragraph providing that "[f]or purposes of this subsection, the term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. 951 *et seq.*), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 *et seq.*)." See Pub. L. 100-690 § 6212, 102 Stat. 4360. The amendment not only confirmed—as petitioners concede—that Congress in-

tended the prohibition against using a firearm during and in relation to a drug trafficking offense to include so-called "passive crimes such as possession with intent to distribute" (Pet. Br. 32), but also that it intended "use" of a firearm under Section 924(c)(1) to embrace the employment of a firearm for security as well.

In the context of possession with intent to distribute and similar offenses, the typical use of a firearm is provide security for the operation. Consequently, a construction of the term "uses" that excludes that employment of a firearm would nullify the application of Section 924(c)(1) to many offenses expressly brought within it by the 1988 amendment. But as this Court has observed:

> [such a] restrictive reading of the phrase "uses . . . a firearm" does violence not only to the language and structure of the statute, but to its purpose as well. When Congress enacted the current version of § 924(c)(1), it was no doubt aware that drugs and guns are a dangerous combination.

Smith, 113 S. Ct. at 2060. As in *Smith*, in view of that understanding, "we * * * see no reason why Congress would have intended courts and juries applying § 924(c)(1) to draw a fine metaphysical distinction." *Ibid.* Regardless whether the gun is drawn, brandished, and fired, or whether it is instead carefully placed to protect the drugs or proceeds and to embolden the defendant, "it creates a grave possibility of violence and death in either capacity." *Ibid.*

D. The Rule Of Lenity Has No Application In This Case

Petitioners contend (Pet. Br. 32) that their narrow construction of the term "uses" in Section 924(c)(1) is at least reasonable and that the statute is therefore ambiguous. Consequently, they maintain, the rule of lenity dictates that the ambiguity be resolved in their favor.

"The mere possibility of articulating a narrow construction [for Section 924(c)(1)], however, does not by itself make the rule of lenity applicable." *Smith*, 113 S. Ct. at 2059. As the Court explained in *Moskal* v. *United States*, 498 U.S. 103, 108 (1990), "because the meaning of language is inherently contextual, [the Court has] declined to deem a statute 'ambiguous' for purposes of lenity merely because it was *possible* to articulate a construction more narrow than that urged by the government." Instead, the rule of lenity comes into play only when, after "[a]pplying well established principles of statutory construction," *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 410 (1991), there is still a "grievous ambiguity or uncertainty in the language and structure of the Act." *Chapman* v. *United States*, 500 U.S. 453, 463 (1991). See *Smith*, 113 S. Ct. at 2059, quoting *United States* v. *Bass*, 404 U.S. 336, 347 (1971) (the "rule [of lenity] is reserved for cases where, [a]fter seiz[ing] every thing from which aid can be derived, the Court is left with an ambiguous statute") (internal quotation marks omitted).

This is not such a case. The "common usage and dictionary definitions of the terms 'uses . . . a firearm,'" *Smith*, 113 S. Ct. at 2060, embrace any employment of a firearm that facilitates a drug trafficking offense, including the use of a firearm to provide security for the venture. Moreover, Congress's design was to impose heightened sanctions when a defendant employs the "dangerous combination" of firearms and narcotics trafficking. *Ibid.* That intention is inconsistent with an interpretation of the statute that singles out particular uses of guns while leaving others unpunished. Whether a gun is overtly deployed or is covertly used to embolden a defendant to commit an offense, the presence of the firearm presents precisely the "grave possibility of violence and death," *ibid.*, that Congress sought to prevent in enacting and subsequently amending Section 924(c)(1).

III. A JURY MAY INFER THE USE OF A FIREARM DURING AND IN RELATION TO A DRUG TRAFFICKING OFFENSE BASED ON ITS PROXIMITY TO THE DRUGS OR PROCEEDS AND ITS ACCESSIBILITY TO THE DEFENDANT

Petitioners argue (Pet. Br. 35-47), in the alternative, that if the "active use" gloss they place on the statute is rejected, this Court should require a multi-factor analysis to determine whether the evidence is sufficient to support a conviction under Section 924(c). In petitioners' view (Pet. Br. 41-44), the court of appeals adopted too narrow a test when it held that the evidence is sufficient to support a conviction under Section 924(c)(1) if it shows that the defendant maintained a firearm proximate to and accessible from drugs or drug proceeds.

The court of appeals' test, rather than petitioners' approach, properly respects the role of the reviewing court to "give[] full play to the responsibility of the trier of fact fairly * * * to draw reasonable inferences from basic facts to ultimate facts." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). The prosecution is not "under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt." *Id.* at 326. As this Court has explained, the "jury is permitted to infer from one fact the existence of another essential to guilt, if reason and experience support the inference." *Tot* v. *United States*, 319 U.S. 463, 467 (1943). When the gun is found proximate to drugs or proceeds and is accessible to the defendant from that location, "reason and experience," *ibid.*, support the inference that it is being employed to facilitate the offense by protecting and emboldening the defendant. Since that is a "use" of the gun "during and in relation to a drug trafficking crime" under Section 924(c)(1), evidence that shows such proximity and accessibility is sufficient.

1. The fact pattern presented by these cases is a common one. The evidence established that the firearm was actually or constructively possessed or controlled by the

defendant [13] and that "the firearm in question was in proximity to the drugs, drug paraphernalia, or drug proceeds and was accessible to the defendant from the site of the drugs, drug paraphernalia, or drug proceeds involved in his or her predicate drug trafficking offense." J.A. 101. In that situation, the court of appeals made clear that there is sufficient evidence to support a Section 924(c)(1) conviction. That conclusion is widely shared in the courts of appeals.[14]

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[13] See, *e.g.*, *United States* v. *Torres-Maldonado*, 14 F.3d 95, 102 (1st Cir.), cert. denied, 115 S. Ct. 193 (1994); *United States* v. *Mathews*, 942 F.2d 779, 783-784 (10th Cir. 1991); *United States* v. *Long*, 905 F.2d 1572, 1576-1578 (D.C. Cir.) (Thomas, J.), cert. denied, 489 U.S. 948 (1990).

[14] See, *e.g.*, *United States* v. *Nieves-Burgos*, No. 94-1370 (1st Cir. July 13, 1995), slip op. 20-21 ("analysis is focussed 'solely on the proximity of the gun to the drugs and the accessibility of the gun to the defendant'"); *United States* v. *Paz*, 927 F.2d 176, 179 (4th Cir. 1991) ("the gun was present and accessible * * * and there is little question that its presence would help facilitate the success of the criminal undertaking"); *United States* v. *Wilson*, 27 F.3d 1126, 1133 (6th Cir.) ("It was within the province of the jury for them to conclude that the * * * rifle was there to protect the * * * cocaine."), cert. denied, 115 S. Ct. 452 (1994); *United States* v. *Woods*, 995 F.2d 713, 718 (7th Cir. 1993) ("Dealers who keep guns 'in strategic proximity' to their drugs or transactions 'use them in relation to' their drug trafficking for purposes of the statute."); *United States* v. *Young-Bey*, 893 F.2d 178, 181 (8th Cir. 1990) ("It is sufficient to show that the defendant kept the firearms readily accessible to protect and facilitate the drug enterprise."); *United States* v. *Baker*, 30 F.3d 1278, 1279-1280 & n.1 (10th Cir.) (evidence sufficient to infer use where there is "evidence the firearm was available to the defendant in the vicinity where the drug trafficking offense took place"), cert. denied, 115 S. Ct. 273 (1994); *United States* v. *Poole*, 878 F.2d 1389, 1393 (11th Cir. 1989) ("the presence of weapons in a location defendant used to distribute a significant quantity of illegal drugs is sufficient to submit to the jury the issue of whether defendant used the firearms in connection with a drug trafficking crime"). The First Circuit has granted en banc rehearing on this issue, among others, in *United States* v. *Ramirez-Ferrer*, Nos. 94-1016, 94-1017, 94-1018 (1st Cir. June 28, 1995).

When firearms are found proximate to drugs or proceeds and accessible to the defendant, the inference that the defendant used the guns to provide security for his drug offense is supported by the "well-recognized nexus between drugs and firearms." *United States* v. *Golter*, 880 F.2d 91, 94 (8th Cir. 1989). As courts have observed, firearms are "tools of the drug trafficking trade." *United States* v. *Gahagan*, 865 F.2d 1490, 1499 (6th Cir.), cert. denied, 492 U.S. 918 (1989); see *United States* v. *Brockington*, 849 F.2d 872, 876 (4th Cir. 1988) (noting "common sense recognition that drug dealing is a dangerous and often violent enterprise"); *United States* v. *Grant*, 545 F.2d 1309, 1313 (2d Cir. 1976) (taking judicial notice that "substantial dealers in narcotics keep firearms on their premises as tools of the trade"), cert. denied, 429 U.S. 1103 (1977); *United States* v. *Wiener*, 534 F.2d 15, 18 (2d Cir.), cert. denied, 429 U.S. 820 (1976) (noting that large scale drug dealers typically keep firearms at their base of operations as a tool of the trade). Empirical studies of the issue confirm that firearms have proliferated in the narcotics trade.[15] At trial in these cases, that point was also underscored by expert testimony.[16]

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[15] See, *e.g.*, A. Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, H. John Heinz III School of Public Policy and Management, Carnegie Mellon Univ. Working Paper Series 18 (1994) ("juveniles, as all participants in the illicit drug industry, are very likely to carry guns for self-protection, largely because that industry uses guns as an important instrument for dispute resolution"); Sheley, *Drug Activity and Firearms Possession and Use By Juveniles*, 24 Journal of Drug Issues 363, 373 (1994) (90% of the drug dealers in the surveyed population owned a firearm and 83% of those who had sold drugs had fired a gun at someone).

[16] In both *Bailey* and *Robinson*, experienced narcotics detectives testified that narcotics dealers commonly employ firearms in order to protect themselves, their wares, the proceeds of their drug dealing, or the narcotics operation itself against rival drug gangs or the police. In some instances, they also employ firearms for "enforcement purposes." J.A. 10; *Robinson* Tr. 77-79. In *Bailey*, the testifying detective added that narcotics dealers not only conceal firearms on their persons, but also frequently, "if it's a stash house where they store their drugs and cash," keep weapons "within the[ir] premises." J.A. 11.

It is true that a gun's proximity and accessibility to drugs or proceeds does not *invariably* mean that the gun was "used" in relation to the drug trafficking offense. For example, the defendant may offer evidence that "he possessed the gun solely for a different purpose—for example as part of a collection of guns that just happened to be kept in a place that later became involved in drug trafficking." J.A. 99. If so, the gun would have been coincidentally located near the drug trafficking operation, but would not have been "use[d] * * * in relation to a drug trafficking crime." But whether such an explanation should be accepted turns on the credibility of the witnesses and the force of the evidentiary presentation. Those are matters for the jury to determine—not the reviewing court. Thus, where there is sufficient evidence of proximity and accessibility, the jury may infer the "use" of the gun. If it does so, the resulting conviction is sufficiently supported by the evidence.[17]

An appellate court applying a proximity and accessibility standard must still, of course, review the evidence for sufficiency. In *United States* v. *Theodoropoulos*, 866

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[17] Petitioners (Pet. Br. 17) and Judge Wald's dissent (J.A. 103-104) argue that, under the court of appeals' standard, the gun need not be shown to be accessible to the defendant. The court of appeals, however, specifically held that one "uses" a gun "whenever one puts or keeps the gun in a particular place from which one (or one's agent) can gain access to it if and when needed to facilitate a drug crime." J.A. 95. Because the crime of possession with intent to distribute narcotics is a continuing offense, it is sufficient that the gun be "accessible to the defendant from the site of the drugs, drug paraphernalia, or drug proceeds," J.A. 101, at some point during the possession. Thus, the court of appeals' test requires accessibility to the defendant at some point during the commission of the crime—although not necessarily at the moment when the defendant is arrested.

F.2d 587 (3d Cir. 1989), for example, the Third Circuit held that a loaded shotgun located inside an apartment and accessible to drug traffickers operating at that location constituted evidence that the weapon was "used" during and in relation to a drug trafficking conspiracy. *Id.* at 597. The court also held, however, that three other firearms concealed in a trash can on a porch outside the building did not satisfy the requirement of proximity and accessibility. *Id.* at 597. Where, as in that case, no other basis for inferring "use" has been established, a reviewing court must find the evidence insufficient to support a conviction under Section 924(c).

2. Petitioners urge (Pet. Br. 44-47) that a five-factor balancing test be used to test the sufficiency of the evidence in Section 924(c) cases. Factor (1) is accessibility, which respondents concede "lends some support to an inference that the gun provided protection for the drug offense or that the defendant derived some service from the gun." Pet. Br. 45. Petitioners' other factors are (2) "proof of an earlier drug transaction at which the firearm was actively employed or available to protect the drug operations," (3) "the type, condition, and number of firearms involved," (4) "whether the firearm was loaded and ready to fire," and (5) "whether expert testimony bolstered the government's theory of 'use.'" Pet. Br. 45-46.

Evidence relating to petitioners' factors (2)-(5) may in some cases have probative value to the jury in considering whether to infer "use" under Section 924(c). Those factors may also in some cases be sufficient to support submission of a case to the jury even when the proximity and accessibility tests are not satisfied. None of them need be present, however, to support the jury's inference of "use" under Section 924(c).

For example, proof of possession with intent to distribute under 21 U.S.C. 841(a)(1) does not require proof of a drug transaction. Yet it is clear that Congress

intended use of a gun during and in relation to that offense to constitute a violation of Section 924(c); clarifying that Section 924(c) covered such offenses was the primary purpose of the 1988 amendment to the statute. See 114 Cong. Rec. 32,965 (1986) (prior statute "does not cover * * * possession with intent to distribute," but "amendment makes clear that section[] 924(c) * * * cover[s] *all* drug offenses") (emphasis added). To require proof of a drug transaction in a Section 924(c)(1) prosecution based on possession with intent to distribute would effectively undo Congress's 1988 amendment to the statute. Even where distribution, and not mere possession, is charged, a gun can facilitate a dealer's distribution by protecting his "stash," even if the gun is not itself brought to the site of a drug transaction.

Similarly, the type, number, and condition of the firearms, as well as whether they were loaded when they were found, may be probative in jury argument, but is not essential in order to submit a case to the jury. As petitioners agree, "the 'use' of a single weapon violates the statute." Pet. Br. 46. Even an unloaded, small weapon can quickly be converted into an instrument of violence, and it can be used to threaten policemen or others—possibly prompting dangerous responses—and thus to provide security for the commission of the drug offense.[18] Finally, although expert testimony may be useful in particular cases, it is not required in a Section 924(c) offense. To return a conviction, the jury must infer that the defendant placed a gun proximate to drugs or proceeds and

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[18] See, *e.g.*, *United States* v. *Hill*, 967 F.2d 902, 905-907 (3d Cir. 1992) (unloaded, disassembled, concealed rifle); *United States* v. *Moore*, 919 F.2d 1471, 1476 (10th Cir. 1990) (defective machine gun); *United States* v. *Coburn*, 876 F.2d 372, 375 (5th Cir. 1989) ("[t]he fact that a firearm is 'unloaded' or 'inoperable,' does not insulate the defendant from the reach of section 924(c)"); *United States* v. *York*, 830 F.2d 885, 891 (8th Cir. 1987) (lack of firing pin and defective cylinder), cert. denied, 484 U.S. 1074 (1988).

accessible to them to facilitate his drug trafficking offense. That is a common-sense inference, of a type that is ordinarily well within the province of a jury.

3. Applying the correct standard, the evidence in these cases was sufficient to support the convictions under Section 924(c). Bailey was arrested in a car that served as a mobile operation for the distribution of cocaine. Located adjacent to some of the cash proceeds in the trunk was a loaded nine millimeter Smith and Wesson pistol. The jury could infer from the proximity of the pistol to the money, and the accessibility of it to Bailey when he handled the funds, that the pistol was used to provide protection and security to his drug trafficking. Likewise, Robinson's .22 Derringer pistol was found, in her apartment, in a trunk that also contained marked money representing the proceeds of a drug deal as well as two plastic baggies containing cocaine. Robinson had been observed retrieving cocaine from the bedroom where the trunk was located the previous day. The jury could infer from the location of the pistol in a place where petitioner went to obtain drugs that the pistol provided protection and security to her in her distribution of cocaine. Accordingly, the court of appeals correctly affirmed the jury's finding in each case of a violation of Section 924(c)(1).[19]

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[19] Because the en banc majority did not consider liability under the "carries" prong of Section 924(c)(1), if the Court does not agree with our submission in this case, the appropriate disposition would be to remand to the court of appeals for consideration of that basis for upholding the convictions.

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Section 924(c)(1), 18 U.S.C., provides, in relevant part, as follows:

> (c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years[.] * * * Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.
>
> (2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

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ROLAND J. BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

CANDISHA S. ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR THE PETITIONERS

Confronted with a statute whose language cannot plausibly be read to support his position, the Solicitor General makes a valiant effort to pretend that the "plain language" of the statute is actually helpful to his cause. But the Solicitor General's clever rhetorical device – insisting that *our* position requires the addition of words to the statute – should not be allowed to obscure the linguistic implausibility of his argument. And when it comes to the statutory structure, the legislative history, the rule of lenity, and the D.C. Circuit's two-factor test, the Solicitor General has nothing even remotely convincing to say.

I. SECTION 924(c) CRIMINALIZES ONLY THE ACTIVE EMPLOYMENT OF A FIREARM

A. The Government's Interpretation Is At Odds With The Ordinary Meaning Of The Phrase "Uses * * * A Firearm"

The government's affirmative case rests almost entirely on its claim that the "ordinary" or "natural" meaning of the phrase "uses * * * a firearm" includes possession of a firearm "for protection or security in the event that it is needed." U.S. Br. 11-14. That proposition, however, is incorrect.

1. Some hypothetical examples will quickly test the government's contention that one who places a firearm in a nightstand for protection has "used" the firearm, as has one who strategically places it in the trunk of a car or in a footlocker, even if the gun is never removed from its secure hiding place. U.S. Br. 13-14, 36.

Person *A* places a classified advertisement in a newspaper:

FOR SALE. One handgun, never used.

Person *B* responds and buys the handgun but then learns that *A* kept the gun in his nightstand. *B* sues *A* for fraud, contending that *A* lied about never having "used" the firearm, because placing the gun in the nightstand was "using" it. If the government is right about the plain meaning of "uses * * * a firearm," *B* should win. We submit, however, that *B* should not win. No ordinary speaker of the English language would believe that *A* "used" a firearm.

Person *C*, a witness in a trial, is examined as follows:

Counsel: Isn't it true that you bought a firearm in 1986?

Witness *C*: Yes.

Counsel: And did you ever use that firearm?

Witness *C*: No.

Knowing that *C* actually kept the gun in his car's trunk for protection – though he never took it out and fired it, brandished it, or traded it for drugs – the State then brings a perjury prosecution against *C*, contending that he lied when he said he never "used" the firearm. If the Solicitor General is right about the plain meaning of "uses * * * a firearm," *C* should be convicted. We submit, however, that *C* should not be convicted. No ordinary speaker of English would believe that *C* "used" a firearm. As these examples show, the government's interpretation of "uses * * * a firearm" is at odds with the ordinary meaning of that phrase.

2. The error of the government's reading is confirmed by the linguistic analysis of Section 924(c) in a forthcoming article (which has been lodged with the Clerk). See Clark Cunningham & Charles Fillmore, *Using Common Sense: A Linguistic Perspective on Judicial Interpretations of "Use a Firearm,"* 73 WASH. U.L.Q. 1159 (1995). Cunningham and Fillmore analyze the ordinary meaning of the phrase "uses * * * a firearm" by examining instances where that phrase (or its equivalent) occurs in newspaper articles and in Title 18 of the United States Code. See *id.* at 1162, 1174-1175 & n.92. They conclude that the government's interpretation is "contrary to linguistic 'common sense.'" *Id.* at 1203.[1]

Cunningham and Fillmore observe that the word "use" belongs to a class of verbs whose meaning hinges largely on context. 73 WASH. U.L.Q. at 1175-1178. Thus, the phrase "W used X"

> express[es] an idea more fully stated in the form "W used X as Y to do Z." X served an instrumental function, Y, in some purposeful activity, Z, in which X was engaged. The nature of that primary activity (Z) needs to be known before we can understand the full message of a "W uses X" utterance.

Id. at 1176. For example, the phrase "[t]hey used a rock" is "uninformative if it has no contextual support." *Ibid.* But the phrase takes on far more meaning if we learn that the context is a conversation about how several boys "kept the cabin door from blowing shut (they used a rock) [or] * * * how they dealt with the fact that there were not any picnic tables in that part of the park (they used a rock)." *Id.* at 1177. Because the verb "use" draws so much of its meaning from context, "dictionary definitions of 'use' are particularly unhelpful." *Id.* at 1178.[2]

Cunningham and Fillmore distinguish between "eventive" and "designative" meanings. An eventive meaning is one in which "a reader would understand that a specific event took place in which the gun played an instrumental role." 73 WASH. U.L.Q. at 1183. Thus, the statement "John used a gun in self-defense" is eventive because it suggests that "[u]sing the gun was a specific time-bound act." *Ibid.* By contrast, a "designative" meaning "does not bring to mind a specific event" but rather "designate[s] the firearm *to a particular purpose* * * * or * * * agent." *Id.* at 1182 (emphasis added). As an example of a "designative" usage, Cunningham and Fillmore cite an illustration relied on by both the en banc majority (J.A. 93-94) and the government (U.S. Br. 13): a gun kept in a drawer beside one's bed for fear of an intruder is "used for domestic protection." In such a designative usage, "it becomes difficult to identify an activity * * * for which the gun served an instrumental role." 73 WASH. U.L.Q. at 1181.

Cunningham and Fillmore proceed to consider "whether the * * * textual context of *use a firearm* in [Section 924(c)] makes it plausible to interpret *use* as designative." 73 WASH. U.L.Q. at 1186. For numerous reasons, this interpretation "defies semantic common sense." *Id.* at 1188. *First*, where "use" appears in a

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[1] If a statute's meaning turns on words that are to be given their "ordinary or natural meaning" (*Smith* v. *United States*, 113 S. Ct. 2050, 2054 (1993)), linguistic analysis is particularly relevant. See Cunningham & Fillmore, 73 WASH. U.L.Q. at 1173-1174. It is especially helpful, moreover, in resolving problems of "structural ambiguity" that arise in complex statutory sentences and in clarifying word meaning. Clark Cunningham et al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561, 1569-1570 (1994) (*Plain Meaning*). This Court has taken note of linguistic analysis in deciding statutory cases. *E.g.*, *United States* v. *Granderson*, 114 S. Ct. 1259, 1267 n.10 (1994).

[2] See also *Plain Meaning*, 103 YALE L.J. at 1614-1616 (explaining limitations of dictionary definitions). The government's "plain language" argument rests almost entirely on dictionary definitions of the word "use." See U.S. Br. 12.

designative sense in Title 18, it consistently is accompanied by the word "for," which signals the designative usage. *Id.* at 1162, 1182, 1186-1187. See, *e.g.*, 18 U.S.C. § 921(a)(17)(C). In Section 924(c), by contrast, the word "for" is not employed in conjunction with the phrase "uses * * * a firearm" and no purpose is specified. *Second*, "the combination of 'uses' with 'carries' connected by 'or'" both "indicates that using a gun is a specific act" and invokes the "familiar and established" pairing of those two terms (according to which using is "more dangerous" than carrying). 73 WASH. U.L.Q. at 1187-1188 (internal quotations omitted). *Third*, "all of the appearances [in Title 18] of *use a firearm* that invite a designative interpretation are *exceptions* to legal liability, and in particular, exceptions to liability based on possession of a firearm." *Id.* at 1183 (emphasis altered). *Fourth*, in several provisions of Title 18, Congress could have employed the phrase "use a firearm" in a designative sense but instead chose "possess." See *id.* at 1183-1184.[3]

In short, a contextually sensitive "plain meaning" analysis – in contrast to the Solicitor General's one-word-at-a-time dictionary exercise – confirms that Section 924(c) is violated only if "a specific event took place in which the gun played an instrumental role." 73 WASH. U.L.Q. at 1183.

3. The government criticizes our analysis as attempting to "engraft[ ] an 'active' requirement onto the clear and unqualified statutory text" of Section 924(c). U.S. Br. 18-19. This claim lacks merit because the ordinary meaning of the phrase "uses * * * a firearm" – both in isolation and in the context of Section 924(c) – signifies the employment of the weapon during some event (the predicate offense) as an instrument to accomplish that offense. That ordinary meaning necessarily includes the idea of active employment; there is no need to add the adjective "active" to the statutory language. If anyone is asking this Court to add words to the statute, it is the government: when speakers of English wish to

[3] See, *e.g.*, 18 U.S.C. § 922(x)(3)(A)(ii)(II), 922(x)(3)(D). Cunningham and Fillmore also note that the word "during" in Section 924(c) "certainly invites an eventive interpretation." 73 WASH. U.L.Q. at 1187. And they find strong support for an "eventive" interpretation in the legislative history of Section 924(c). See *id.* at 1189-1198.

communicate the idea that a firearm is designated to serve a particular purpose such as protection, they do not say simply that the firearm "is used"; they say it is "used *for protection*."

B. Evidence In The Language And Structure Of The Statute Refutes The Government's Interpretation Of "Use"

The government's reading of the statute also cannot be reconciled with substantial evidence of a narrower meaning in the structure and language of Section 924(c) and Section 924 as a whole.

1. The government offers no explanation of what it means to "carr[y] a firearm" or how that alternative basis for liability relates to liability for "use." The government urges this Court to treat the statute's operative language as if it criminalizes "use" alone. U.S. Br. 11 n.2, 44 n.19.[4] But, for at least two reasons, the inclusion of "carr[ying]" as an alternative basis for liability refutes the government's reading of the statute.

First, under the government's definition of use liability, the alternative element of "carrying" is superfluous. Pet. Br. 16-17. Whenever a person carries a firearm during and in relation to a drug-trafficking offense, he is also possessing it in a way that "embolden[s]" him and that "provide[s] protection and security." U.S. Br. 10, 13-14. If the government's argument about "use" is correct, there was no reason for Congress to mention "carr[ying]."

The government does not dispute that its reading renders the statute's alternative element superfluous. See U.S. Br. 22-25. Instead, it asks this Court to recognize an exception to the basic principle that each word in a statute must be given effect. See *Ratzlaf* v. *United States*, 114 S. Ct. 655, 659 (1994). The government says that, before 1984, "'use' and 'carry' liability were *fundamentally different from each other and from liability under the current statute*"; that, in 1984, Congress added the phrase "during and in relation to" and combined the two subsections into one, thereby omitting the requirement that any carrying be "unlaw-

[4] Contrary to the government's suggestion (U.S. Br. 44 n.19), this Court can and should reach the issue whether petitioners' convictions can be upheld on the basis of "carrying" liability. As explained in our opening brief (at 16 & n.5), the scope of liability for carrying a firearm is clear and does not encompass the facts of either of petitioners' cases.

ful[ ]" as well as dropping "to commit" from "uses * * * to commit"; and that the "amendment divested the terms 'uses' and 'carries' of the qualifications ('to commit' and 'unlawfully during') that gave them distinct connotations." U.S. Br. 24 (emphasis added). Even if this were an accurate analysis of the legislative history (it is not, see pp. 8-9, *infra*), it would not explain why Congress retained a redundancy in this criminal statute.

Second, the word "carry" sheds significant light on the meaning of "use" because the two terms are paired in the statute as alternative bases for liability. See Pet. Br. 17-18. Such pairings can affect the meanings of the constituent words: the word "draw," for example, means something different in the phrase "draw and paint" than it does in the phrases "draw and fire" and "draw and quarter." Similarly, the word "carry" in Section 924(c) suggests a narrow meaning of "use." See Pet. Br. 18. Congress "saw 'use' as a *comparatively narrow* term, with 'carry' picking up cases of an alternative type of activity, where the defendant did not actively 'use' the weapon." J.A. 112 (dissent) (emphasis added). That "use" and "carry" bear this relationship to each other is confirmed by the legislative history of Section 924(c) (see Pet. Br. 18 n.7) and by linguistic analysis of the statute. See Cunningham & Fillmore, 73 WASH. U.L.Q. at 1187-1188, 1208-1209; Michael Geis, *The Meaning of* Meaning *in the Law*, 73 WASH. U.L.Q. 1125, 1137-1138 (forthcoming 1995) (lodged with the Clerk).

The Solicitor General, in his brief in *McLaughlin* v. *United States*, 476 U.S. 16 (1986), stated: "It appears that Congress is of the view that *something more than the carrying of the gun* is required to establish its use." U.S. Br. 19 n.18 (No. 85-5189) (emphasis added); see J.A. 114-115 (dissent). This statement strongly confirms that the Solicitor General (like the other users of English surveyed by Cunningham and Fillmore) understands the pairing "use or carry," when combined with the direct object "firearm," to express a particular kind of relationship between those verbs: "use" of a firearm means conduct that is more serious or culpable than "carrying."[5]

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[5] The government maintains that, under its interpretation of Section 924(c), "something more" is also required to establish "use" as opposed to "carrying": possession of the firearm must "facilitate commission of

2. The government makes no attempt to explain why Congress would have had any need in 18 U.S.C. § 924(d) to specify as firearms subject to forfeiture those that are merely "involved in" certain offenses. The government does, however, attempt to explain away Congress's differentiation in Section 924(d) between firearms that are "used," and those merely "intended to be used," in certain offenses. See U.S. Br. 25-26. The government seems to contend that those two phrases were included because they refer to entirely "different classes of firearms" – those that the defendant intends to use in some future crime ("intended to be used") and those that are or were used in a past or ongoing offense ("used"). But that argument is foreclosed by *Smith*, and furthermore there is nothing in the statute to suggest that the two phrases do not also refer to two kinds of firearms that can be involved in an ongoing offense: those that are actively employed to carry out the predicate offense ("used") and those that are merely possessed for protection but never put to use ("intended to be used").[6]

3. The word "use" appears a second time in the operative sentence of Section 924(c) and conveys the unmistakable suggestion of active employment (see Pet. Br. 15): "a crime of violence or drug trafficking crime which provides for an enhanced punishment if *committed by the use of* a deadly or dangerous weapon or device." It is unlikely that Congress would have employed the word "use" in two different senses in the very same sentence. The government fails to offer a convincing response to this point.[7]

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the predicate crime, such as by emboldening the defendant or furnishing protection to the trafficking operation." U.S. Br. 23 n.7. But every instance of carrying can also be described as one where the defendant is emboldened or is in possession of the firearm to protect the drug-trafficking venture. Thus, "something more" is *not* required to show "use" under the government's theory. And the government's argument does not explain away the government's concession in *McLaughlin* that "using" a firearm is conduct more culpable or dangerous than carrying it.

[6] See also U.S. Br. 25 (conceding that firearms "intended to be used" reaches "future uses of firearms during the course of ongoing offenses").

[7] The government concedes that the highlighted phrase "may suggest an 'active use' requirement because the words 'committed by' may imply the use of the weapon as the means or instrumentality of committing the

C. The Legislative History Supports Our Interpretation

The government's efforts to explain away some (but not all) of the legislative history cited in our opening brief (at 22-32), and its related efforts to muster some trace of support in the legislative history for its own interpretation, are wholly unsuccessful.

1. The government's treatment of legislative history is internally inconsistent. On the one hand, the government argues that the statutory language is "plain" and that this Court may not properly consult the legislative history. U.S. Br. 27. On the other hand, the government relies heavily on the legislative history in its efforts to explain away some of the most potent evidence against it. See U.S. Br. 21-22, 24-25. In particular, the government maintains that, before the 1984 amendment, "'use' and 'carry' liability were *fundamentally different* * * * from liability under the current statute." U.S. Br. 24 (emphasis added). In 1984, the government asserts, Congress caused the two bases for liability to converge by removing the "qualifications ('to commit' and 'unlawfully during') that gave them distinct connotations." U.S. Br. 24.

The claim that Congress expanded the meaning of "use" liability in or after 1984 is critical to the government's argument because, before 1984, "use" liability could not possibly have meant what the government says it now means. At that time, the statute included the phrase "uses *to commit*," which the government does not claim is capable of accommodating the interpretation urged on this Court. See U.S. Br. 21, 24-25, 29-30, 33; note 7, *supra*. In addition, the government's construction would have rendered superfluous the word "unlawfully" (which before 1984 qualified "carry" liability), and thus violated the principle that every word in a statute must be given effect. Cunningham & Fillmore,

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offense" but maintains that the pertinent phrase "is not a reliable guide" for determining the meaning of "uses * * * a firearm" because the phrase originally was "intended to refer" to a handful of penalty enhancement provisions in specific statutes, and thus "was not intended to * * * track the basic prohibition of Section 924(c)." U.S. Br. 21-22. In the absence of any showing that the provision tracks the language of the penalty provisions to which the government refers, its argument provides no basis to depart from the usual assumption that, when Congress uses the same word twice in the same sentence, it intends the same meaning.

73 WASH. U.L.Q. at 1191-1192. Acceptance of the government's interpretation thus depends on a showing that Congress expanded "use" liability in 1984 or thereafter.

The government does not suggest that Congress expanded the meaning of "use" liability in 1986 or 1988; it focuses instead on the 1984 amendment. The threshold difficulty with that argument is that only *in 1988* did Congress include among Section 924(c)'s predicate offenses passive drug offenses, in which (according to the government) "the typical use of a firearm is [to] provide security for the operation." U.S. Br. 36; see also *id.* at 20. Even more damaging to the government's theory is the fact that in 1984 Congress *narrowed* the category of predicate offenses from all federal felonies (including *drug-trafficking felonies*) to "crime[s] of violence." See Pet. Br. 25; U.S. Br. 29, 31. Thus, at the same time that the government says Congress was "fundamentally" expanding the concept of "use" beyond active employments of the firearm as an instrumentality of the predicate offense, Congress was narrowing the predicate offenses to a kind – crimes of violence – in which (the government elsewhere concedes) "[a]s a general matter * * * guns are used * * * as instrumentalities of the offense." U.S. Br. 20. This scenario is implausible, to say the least. If Congress meant to expand "use" to cover the possession of a firearm for protection during a predicate offense, why would it have narrowed the statute so that only possessions occurring during "crimes of violence" (but not during non-violent federal felonies) were subject to criminal penalties?[8]

2. Apart from its untenable theory of "fundamental[ ]" change to "use" liability in 1984, the government offers *only one* piece of evidence from the legislative history in support of its proposed in-

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[8] Nothing in the legislative history remotely suggests that Congress meant to expand the meaning of "use" in 1984. See Pet. Br. 25-27 & n.15; J.A. 111 (dissent). The Senate Report comments on a variety of other changes to the statute brought about by the 1984 amendment – several of which would have been far less significant than the "fundamental[ ]" change to "use" liability claimed by the government. See Pet. Br. 25-27. In addition, Congress's removal of the phrase "to commit" in 1984 was necessary to avoid an ungrammatical construction. See Cunningham & Fillmore, 73 WASH. U.L.Q. at 1195-1196.

terpretation of "uses * * * a firearm" in Section 924(c). It quotes a remark made in 1968 by Representative Poff, who, according to the government, announced in introducing his amendment that its purpose was "'to persuade the man who is tempted to commit a Federal felony to leave his gun at home.'" U.S. Br. 27 (quoting 114 Cong. Rec. 22,231 (1968)). The government maintains that this statement "strongly suggests that the 'uses' prong was intended to reach anyone who commits a federal felony and does not 'leave his gun at home.'" U.S. Br. 28.

A more selective use of legislative history is difficult to imagine. This snippet lifted from the floor debate is *not* a declaration of the Poff amendment's purpose. Rather, it is a statement about the general deterrent effect Poff thought his measure would have on those who, in the absence of the measure, would "carry" their firearms during an underlying offense (a statement made, moreover, in response to the anticipated criticism that mandatory sentences can be counterproductive). See 114 Cong. Rec. 22,231 (1968). Nor can the government be serious in suggesting that Section 924(c) reaches every case where the perpetrator of a drug-trafficking offense or crime of violence merely fails to "leave his gun at home." U.S. Br. 28. That interpretation would criminalize simple possession of a firearm "during and in relation to" a drug-trafficking offense, and would in some cases read the latter elements out of the statute entirely. In any event, the government's interpretation of Representative Poff's comment is at odds with its claim that "use" liability before 1984 was "*fundamentally different* * * * from liability under the current statute." U.S. Br. 24 (emphasis added).[9]

3. The government also argues that the "construction of the 1984 amendments" must be "informed by the principle that when

[9] The government suggests (U.S. Br. 28-29 & n.9) that only the statements of Representative Poff are relevant to understanding the meaning of the statute as enacted in 1968, yet in previous cases the Solicitor General has relied on the statements of other legislators to discern the statute's meaning. See, *e.g.*, U.S. Br. 19-21, *Deal* v. *United States*, 113 S. Ct. 1993 (No. 91-8199) (relying on statements of numerous Members regarding the Poff and Casey amendments); U.S. Br. 26-36, *Busic* v. *United States*, 446 U.S. 398 (1980) (Nos. 78-6020 and 78-6029) (same).

Congress reenacts legislation that has been subject to a 'settled judicial construction,' the courts 'will apply the presumption that Congress was aware of these earlier judicial interpretations and, in effect, adopted them.'" U.S. Br. 32 (quoting *Keene Corp.* v. *United States*, 113 S. Ct. 2035, 2043 (1993)). According to the government, by 1984 "the term 'uses' in Section 924(c) had been uniformly construed to embrace any employment of a firearm to facilitate the commission of a federal felony, including the sorts of uses for protection that are at issue in this case." U.S. Br. 32.

That argument is inconsistent with the government's claim (U.S. Br. 24) that Congress "fundamentally" altered the nature of "use" liability in 1984. Furthermore, the premise of the government's argument is mistaken. In keeping with the ordinary understanding that carrying a firearm describes a broader (and less serious) class of conduct than using a firearm, the great majority of the approximately 270 reported cases between 1968 and 1984 were decided under the "carrying" prong. Of the cases involving firearm "use," moreover, virtually all were cases in which the firearm was actively employed to carry out the predicate offense.[10] Far from establishing the "uniform construc[tion]" the government claims, the three pre-1984 decisions of the Second and Ninth Circuits cited by the government (see U.S. Br. 32-33) are anomalies, perhaps influenced by unusual facts. Nor does anything in the legislative history support the reenactment theory.

Finally, the government's argument for congressional acceptance in 1984 of broad judicial construction of Section 924(c) should be rejected because Congress, since 1988, has repeatedly attempted to amend Section 924(c) so that it would cover precisely the kind of conduct that the government claims it *already* cov-

[10] See, *e.g.*, *United States* v. *Chilcote*, 724 F.2d 1498, 1500-1501 (11th Cir.) (brandished), cert. denied, 467 U.S. 1218 (1984); *United States* v. *Burns*, 701 F.2d 840, 841 (9th Cir.) (same), cert. denied, 462 U.S. 1137 (1983); *United States* v. *Shaw*, 701 F.2d 367, 375 (5th Cir. 1983) (fired), cert. denied, 465 U.S. 1067 (1984); *United States* v. *Sheppard*, 569 F.2d 114, 115 (D.C. Cir. 1978) (brandished); *United States* v. *Reid*, 517 F.2d 953, 955 (2d Cir. 1975) (fired); *United States* v. *West*, 486 F.2d 468, 469 (6th Cir. 1973) (same), cert. denied, 416 U.S. 955 (1974).

ers.[11] A 1989 bill, for example, was aimed at "broaden[ing]" Section 924(c) "to reach persons who have a firearm * * * available during the commission of certain crimes, even if the firearm is not carried or used," as where "a loaded firearm [i]s found in the dresser drawer of an apartment which the defendant utilize[s] in connection with his drug dealings." 135 Cong. Rec. 13,079 (1989) (section-by-section analysis of S. 1225); *ibid.* (amended statute would be expanded to cover firearm possessed by defendant "*for potential employment* in his illegal activities") (emphasis added). This evidence refutes the government's strained argument about congressional acquiescence.

4. The government fares no better in its efforts to explain away abundant evidence (see Pet. Br. 22-32) from the legislative history that supports our position. Senate Report No. 225 includes the following statement: "[T]he requirement that the firearm's *use or possession* be 'in relation to' the crime would preclude its application in a situation where its presence played no part in the crime, such *as a gun carried in a pocket and never displayed or referred to* in the course of a pugilistic barroom fight." S. Rep. No. 225, 98th Cong., 2d Sess. 314 n.10 (1983) (emphasis added), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3492 n.10.; see Pet. Br. 27-28. If the scenario described is insufficient to trigger liability for either use or carrying, then possession short of carrying (for the purpose of protection or to embolden the defendant) could not possibly give rise to use liability. See Pet. Br. 28.[12]

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[11] See, *e.g.*, S. 1225, 101st Cong., 1st Sess. § 113 (1989) (proposing to replace "uses or carries a firearm" with "uses, carries, or *otherwise possesses* a firearm") (emphasis added); S. 1356, 103d Cong., 1st Sess. § 1007 (1993) (same); S. 2305, 102d Cong., 2d Sess. § 401 (1992) (proposing to replace "uses or carries" with "knowingly uses, carries, or otherwise possesses"). See generally Cunningham & Fillmore, 73 WASH. U.L.Q. at 1198-1203 (describing and analyzing Congress's post-1988 efforts to expand statute to cover possession of firearm).

[12] The passage also contains the following statement: "Evidence that the defendant had a gun in his pocket but did not display it, or refer to it, could *nevertheless* support a conviction for 'carrying' a firearm in relation to the crime if from the circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make

Equally unavailing is the government's attempt to explain away an example in House Report No. 495 relating to drug traffickers. Compare Pet. Br. 30-31 with U.S. Br. 34-35. The government simply ignores the example, which demonstrates that Congress understood that "carry" rather than "use" liability would attach to a drug dealer who "carried [a firearm] *for protection*." H.R. Rep. No. 495, at 10 (emphasis added), 1986 U.S.C.C.A.N. at 1336. The government instead focuses on the sentence that precedes the drug trafficker example, in which the Committee contrasts carrying a firearm with "actually us[ing]" it. *Ibid.* (emphasis omitted). The government states that in this instance the phrase "actually uses" means "the firing or discharge of the weapon" (U.S. Br. 35) but fails to explain why the word "actually" narrows the meaning here but not elsewhere. See U.S. Br. 28-29 & n.9 (arguing that "actual use" of firearm includes possession to protect drugs and that reference to "actual use" does not support our position).[13]

D. The "Active Employment" Interpretation Is Not Foreclosed By *Smith* Or The Government's Policy Arguments

1. According to the Solicitor General, "it follows *a fortiori*" from this Court's decision in *Smith* v. *United States*, *supra*, "that when a defendant places a gun near drugs or proceeds to provide security for the commission of a drug trafficking crime, he has

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his escape." S. Rep. No. 225, at 314 n.10 (emphasis added), *reprinted in* 1984 U.S.C.C.A.N. at 3492 n.10. The government claims (U.S. Br. 30-31) that this statement has nothing to do with "use" liability and relates only to "carry" liability. That reading is untenable. It fails to account for the word "nevertheless," which suggests a contrast to the preceding sentence. Because the preceding sentence includes an example of "use" liability, the sentence in question necessarily describes a scenario that would not qualify for "use" liability.

[13] The government invokes a supposed "broad expression of purpose" behind the 1986 amendment on the part of the House Judiciary Committee. U.S. Br. 34. The language quoted, however, comes from sections of the House Report that describe either testimony heard by a subcommittee or anticipated benefits for law enforcement personnel. The report describes the legislation's "purpose" in a manner that does not aid the government. H.R. Rep. No. 495, at 1, 1986 U.S.C.C.A.N. at 1327.

'used' the gun within the meaning of the statute." U.S. Br. 14-15. The argument is based on a misreading of *Smith*.[14]

The government fails to recognize that "the interpretive issue in *Smith* is linguistically quite different from that presented" here. Cunningham & Fillmore, 73 WASH. U.L.Q. at 1173; see also *id.* at 1181. There, the Court was called on to decide whether Section 924(c) reaches only those cases where a firearm is "used as a weapon" or also cases where the firearm's instrumental role is more unusual – such as where a firearm is used as an item of barter. To return to an example employed above, if the phrase "W used X" is given its expanded form "W used X *as Y* to do Z," the Court was called on to interpret the highlighted unexpressed phrase. Thus, the issue in *Smith* was whether Section 924(c) punishes not only those *active employments* of a firearm to carry out a predicate offense in which the firearm is used as a weapon, but also *active employments* where the instrumental role is more unusual. Here, by contrast, the Court must determine whether Section 924(c) reaches *passive* relationships between the firearm and the predicate offense (relationships that cannot easily be described by the phrase "W used X as Y to do Z"). Accord J.A. 115-116 (dissent).[15]

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[14] In its discussion of *Smith*, the government incorrectly suggests (U.S. Br. 15-16) that our "active employment" interpretation was rejected by the D.C. Circuit in *United States* v. *Long*, 905 F.2d 1572, 1576-1577 (Thomas, J.), cert. denied, 498 U.S. 948 (1990). The court of appeals in *Long reversed* a Section 924(c) conviction on the ground that there was insufficient evidence to show that the firearm in question had been "used" and explicitly stated (905 F.2d at 1578-1579) that it was basing it decision not on an interpretation of "use" but rather on the ground that possession was a precondition to use and there was insufficient evidence of possession. Thus, the *Long* court's statement that "offenders can 'use' guns simply by possessing them in the vicinity of drugs" (*id.* at 1576) can hardly be viewed as a holding. Moreover, the *Long* court's dictum, read in context, is nothing more than a descriptive statement of how other courts had given the word "use" a broad interpretation. Compare *id.* at 1576 (rejecting government's claim that "loose, transitive relationship" between firearm and predicate offense could give rise to "use" liability).

[15] The government also ignores this Court's reasons in *Smith* for deciding that the statute reaches beyond instances where a firearm is used in its ordinary or typical instrumental role. The decision turned in part on the language of Section 924(d)(1), which authorizes the forfeiture of firearms and ammunition that are "involved in or used in" certain offenses and "intended to be used" in other offenses. 18 U.S.C. § 924(d)(1); see also *id.* § 924(d)(2)(C) (same). Because some of the enumerated offenses include use of a weapon as an item of barter, the Court reasoned, Congress must have intended the word "use" to include trading a weapon for drugs. 113 S. Ct. at 2056-2057. Here, by contrast, there is not the slightest indication in Section 924(d) that Congress envisioned as "use" passive relationships.

2. The government also claims that, if our interpretation of "use" were accepted, Section 924(c) would become "virtually a dead letter in the context of many of the drug trafficking crimes to which it expressly applies." U.S. Br. 20; *id.* at 43 (stating that our interpretation would "effectively undo 1988 amendment"). In possessory drug offenses, the government argues, firearms "ordinarily" are not actively employed to carry out the offense but rather are merely possessed for protection. U.S. Br. 21. In addition to being at odds with empirical data in the government's brief (see U.S. Br. 40 n.15 (citing study purportedly finding that 83% of drug dealers "had fired a gun at someone")), the argument is significantly overdrawn. A firearm obviously *can* be actively employed in the commission of a possessory offense, as for example where a defendant fires, brandishes, or displays a firearm to ward off the police or those seeking to steal the drugs or drug proceeds.

E. The Rule Of Lenity Supports Our Interpretation

Even if the Court concludes that the plain language, structure, and legislative history of Section 924(c) do not compel the active employment requirement, there can be little doubt, in light of the analysis above, in our opening brief, and in academic commentary on Section 924(c), that our interpretation is a reasonable one, and that the statute is *at least* ambiguous. "[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis* v. *United States*, 401 U.S. 808, 812 (1971).

The government argues that the rule of lenity does not apply because "common usage" clearly embraces its broad interpretation that "uses * * * a firearm" means "any employment of a firearm

that facilitates a drug trafficking offense." U.S. Br. 37. As we demonstrate above, however, that claim is mistaken. Moreover, the government concedes that, in determining whether a statute is ambiguous, a party must "'seiz[e] every thing from which aid can be derived.'" U.S. Br. 37 (quoting *United States* v. *Bass*, 404 U.S. 336, 347 (1971)). The government violates that rule, however, when it ignores much of the evidence of the language, structure, and legislative history set out in our opening brief. The government also argues that the rule of lenity does not apply merely because it is "*possible* to articulate" an alternative construction. U.S. Br. 37. But, if anything, it is the government's interpretation that represents merely a "possible * * * articulat[ion]" of the statute's meaning – albeit one in tension with the ordinary meaning of the statute's operative language, lacking other support in the text, structure, and history of Section 924(c), and dependent on the unwarranted premise that Congress "fundamentally" changed the scope of use liability in 1984.[16] Because the "text, structure, and history" of Section 924(c) "fail to establish that the Government's position is unambiguously correct," the rule of lenity applies fully to this case. *United States* v. *Granderson*, 114 S. Ct. 1259, 1267 (1994).

F. The Evidence Was Insufficient To Show Active Employment Of A Firearm To Carry Out The Predicate Offenses

Perhaps recognizing that "the ordinary meaning" of the phrase "uses * * * a firearm" "connote[s] activity beyond simple possession," *United States* v. *McFadden*, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, C.J., dissenting), and that many courts of appeals have held that "use" must mean something more than possession (Pet. Br. 36-38; J.A. 82), the government struggles throughout its brief to conjure up some trace of activity on the part of petitioners

[16] Equally incorrect is the government's attempt to invoke Congress's assertedly broad purpose behind Section 924(c) in arguing that the scope of "use" liability is unambiguous. See *Hughey* v. *United States*, 495 U.S. 411, 422 (1990) (rule of lenity precludes resolution of ambiguities against criminal defendants "on the basis of general declarations of policy in the statute"). And the government overstates significantly the breadth of Congress's purpose. See Pet. Br. 22, 25-26, 29, 32; pp. 10, 13 n.13, *supra*.

with respect to the firearms. Toward that end, the government repeatedly refers to defendants who "place" a firearm in proximity to drugs or drug proceeds, and maintains that the "placement of a weapon in such a way as to protect drugs and drug proceeds is a 'use' of the weapon." U.S. Br. 10. The government even says that petitioners Bailey and Robinson "*deliberately* and 'actively' place[d] a firearm proximate to drugs." U.S. Br. 19 (emphasis added). This claim is problematic in several respects.

First, there was no evidence that Bailey or Robinson "deliberately * * * placed" the handguns involved in their respective cases in the locations where the police found them. In Robinson's case, moreover, the undisputed evidence strongly suggested that Kwarme Parker, not Candisha Robinson, placed the firearm in the locked trunk (to which Parker alone had the key). See Pet. Br. 5-6. Even if the jury could have inferred that petitioner Bailey had placed the firearm in the trunk of his car, there was no basis on which the jury could have concluded that such placement occurred *during* the predicate offense of possession with intent to distribute.[17]

[17] The government misstates the record in several other respects. The government asserts that the $20 in marked money recovered in the search of Candisha Robinson's apartment on July 16, 1991, was the money that had been handed to *Veloria* Robinson, petitioner's sister, by undercover officer Hale "on the previous day" (U.S. Br. 5); in fact, the money came from Hale's purchase on July 16 from Kwarme Parker (during which Candisha Robinson was not present). See 10/30/91 Tr. 28, 134. The government states that on July 16, as Hale was approaching the apartment, Parker met him and said that Parker lived in the apartment with petitioner *Candisha* Robinson (U.S. Br. 5); in fact, Parker told Hale that "*Veloria* was inside the apartment, but that he also lived in the apartment and could serve him." J.A. 48 (emphasis added). The government also states incorrectly that the *Robinson* jury could have "infer[red] from the location of the pistol * * * that [it] provided protection and security in her *distribution of cocaine*." U.S. Br. 44 (emphasis added). Yet Robinson was not charged with distribution on July 16, the date relevant to the Section 924(c) count. See Pet. Br. 5-6 & n.2, 49. She was charged with (and convicted of) using or carrying a firearm on July 16 during the predicate offense of possession with intent to distribute. As for the record in *Bailey*, the government incorrectly maintains that Bailey "was arrested in a car that served as a mobile

Second, a rule of liability that hinges on evidence that the defendant "placed" the firearm near the drugs or drug proceeds would lead to absurd results. If "placement" is a necessary element of the "use" offense when the government relies on a "possession-for-protection" theory, the government would have to show that the act of placing the firearm also occurred *during* the predicate offense. Under that reading, the statute's stiff mandatory sentences would apply to a defendant who possessed a firearm for protection during a distribution offense if the defendant "placed" the weapon in its location while the distribution was occurring, but not if the placement occurred before the distribution began. See also Cunningham & Fillmore, 73 WASH. U.L.Q. at 1181 ("Even if the initial act of placing the gun in the drawer is viewed as an event, that is an act done *to* the gun, not *by means of* the gun.").

Once the government's factually and legally untenable "placement" gloss is rejected, its argument boils down to a request that this Court rule that the mere possession of a firearm during a drug trafficking offense qualifies as a "use." But possession alone cannot be enough to constitute "use." See Pet. Br. 36-38.

II. WHETHER A FIREARM WAS "USED" SHOULD, AT A MINIMUM, BE ASSESSED IN LIGHT OF ALL RELEVANT FACTORS

In our opening brief, we argued that, if the Court does not accept the definition of firearm "use" set forth above, then it should endorse a test that takes into account all of the factors that are relevant to distinguishing between mere possession (which the statute does not reach) and use. Pet. Br. 35-50. We urged the Court to provide guidance by expressly recognizing several clear limits on the concept of "use" that are apparent from the statutory language, structure, and legislative history but have been misunderstood by some of the lower courts (including the court below). Pet. Br. 36-44. Finally, we asked the Court to recognize a variety of factors that are relevant to determining liability and explained

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operation for the distribution of cocaine." U.S. Br. 44. There was no evidence that Bailey had ever distributed cocaine out of his car. Indeed, the government *conceded* before the D.C. Circuit (En Banc Tr. 57) that the evidence in *Bailey* was *legally insufficient to sustain a conviction for distribution*.

why, when the evidence is evaluated in light of those factors, petitioners' convictions cannot be sustained. Pet. Br. 44-50.

The government largely ignores the limiting principles proposed in our opening brief. As for the factors we identified as relevant to determining whether a firearm was "used" (as opposed to merely possessed), the government agrees that each describes evidence that "may in some cases have probative value * * * in considering whether to infer 'use' under Section 924(c)." U.S. Br. 42.[18] The government contends, however, that a reviewing court need not examine the evidence presented under all of the factors because no single factor is necessary in order to prove "use." U.S. Br. 42. The government adds that, in some unspecified category of cases, it may not be necessary for the government even to prove the two factors identified by the D.C. Circuit; proof of some of the other factors we identified might suffice to show "use." U.S. Br. 42. Finally, the government concedes that even proof of the D.C. Circuit's two factors "does not *invariably* mean that the gun was 'used' in relation to the drug trafficking offense." U.S. Br. 41. The countervailing evidence, however, is to be assessed only by the jury (and not by a reviewing court). U.S. Br. 41.

The government's position assuredly will not bring greater clarity to this area of the law. More important, the government's suggested approach departs from the principles governing review for sufficiency of the evidence. Such review preserves "the factfinder's role as weigher of the evidence" and "gives full play to the [factfinder's] responsibility * * * to resolve conflicts in the testimony * * * and to draw reasonable inferences from basic facts to ultimate facts" by providing "that upon judicial review *all of the*

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[18] The government treats the D.C. Circuit's "accessibility" factor (J.A. 80, 101) and our accessibility factor as equivalent, but they are not. See U.S. Br. 42. The D.C. Circuit's test examines the weapon's accessibility from the location where the drugs, drug proceeds, or drug paraphernalia are found, whereas the more relevant consideration is whether the weapon is accessible *to the defendant* from the place where *the defendant is located* "during" the predicate offense. The government also suggests, incorrectly, that the firearms at issue in these cases were kept "within reach" of the defendant. U.S. Br. 25 n.8.

evidence is to be considered in the light most favorable to the prosecution." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). The government cites no authority for the proposition that a reviewing court should assess only a portion of the concededly relevant evidence in conducting sufficiency review.[19]

Finally, the government has ignored another point raised in our opening brief (Pet. Br. 11, 17 & n.6, 38 & n.21). If petitioners' conduct had not been the subject of a separate charge under 18 U.S.C. § 924(c), it could have been punished under the Sentencing Guidelines through an upward adjustment. In this case, therefore, the Court ultimately is called on not to decide what conduct will go unpunished but rather to define the boundary between two sentencing regimes (one calling for rigid mandatory minimum penalties, the other for more carefully calibrated punishment). *McFadden*, 13 F.3d at 467-468 (Breyer, C.J., dissenting). There is accordingly no good reason rooted in federal sentencing policy for the Court to endorse the government's strained construction.

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[19] In any event, the government's approach will not assure that only convictions based on sufficient evidence of "use" will be obtained. Suppose, for example, that the trunk of Bailey's car had been empty, but that, on searching his apartment several miles away, the police had uncovered a turn-of-the-century target pistol that was in a drawer in Bailey's bedroom next to the cash proceeds of drug trafficking. Suppose as well that the pistol was inoperable, was unloaded, and belonged to Bailey's gun-collector roommate (who testified that he, not Bailey, placed it in the drawer); that there was no proof of a prior drug transaction (only Bailey's possession of drugs in his car); and that an expert testified that persons involved in drug trafficking typically use automatic weapons and never use old target pistols. Under the government's theory, the jury could, on the basis of this evidence, lawfully convict Bailey of "using" the pistol "during and in relation to" the predicate offense of possession of cocaine with intent to distribute it, and an appellate court would be powerless to order reversal.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1994

ROLAND J. BAILEY (No. 94-7448),

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CANDISHA S. ROBINSON (No. 94-7492),

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF JAMES DOE IN SUPPORT OF PETITIONERS

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United States v. Bailey, 36 F.3d 106 (D.C. Cir. 1994), *cert. granted*, ___ U.S. ___, 115 S. Ct. 1689 (1995) 8,11,13,19

TABLE OF AUTHORITIES (cont'd)

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United States v. Bass, 404 U.S. 336 (1971). 15-16,25

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S. Rep. No. 225, 98th Cong., 2d Sess. 312-14,
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S. Rep. No. 337, 89th Cong. 1st Sess.,
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INTEREST OF JAMES DOE

Amicus Curiae James Doe, a government witness recognized by the United States for his substantial assistance in the fight against prison drug dealing, was a college-educated, gainfully employed veteran in his early thirties with a minimal prior record (1 misdemeanor) at the time of his arrest in the fall of 1990 during a police raid on a friend's house in the District of Columbia. The search warrant authorizing the raid was based on a sale of drugs to an undercover officer by someone other than Mr. Doe, and not on any prior criminal conduct by Mr. Doe.

The house was not a "crack house" or a "fortress" but a private residence. In fact, the front door was unlocked when the police arrived. None of the defendants resisted the entry of the police or the arrests.

All defendants, including Mr. Doe, were charged with crimes, including possession with intent to distribute at least 50 grams of "crack" in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A), and of violating 18 U.S.C. § 924(c)(1) by using or carrying a handgun during and in relation to that crime. There was no charge that the house was a "crack house" maintained in violation of 21 U.S.C. § 856(a), nor was any conspiracy charged.

Unlike the other defendants arrested along with Mr. Doe -- who were kept in custody from the moment of their arrests -- Mr. Doe was deemed not to be a flight risk and was placed on supervised work release. Mr. Doe merited

the government's trust and never missed any required appearance.

With respect to the charge under Section 924(c), which forms the basis of Mr. Doe's interest in the present action, it is important to note the almost nonexistent connection between the gun and Mr. Doe.

Although Mr. Doe was arrested in an upstairs bedroom in which he sometimes stayed (sharing it with another), the gun for which Mr. Doe was eventually sentenced for "using" was found in a downstairs front hall closet close to the place where the remaining defendants were arrested. One defendant -- not Mr. Doe -- admitted to purchasing the gun for personal protection following the shooting death of a relative near the house shortly before the arrest.

There was no direct evidence that Mr. Doe even knew of the gun's existence or location. For example, the gun was not contained in any article of Mr. Doe's clothing, nor in any bag or container owned, controlled or used by Mr. Doe. Only the facts that Mr. Doe lived part-time at the house, happened to be in the house at the time of the raid, and was named on the lease along with the primary resident, a friend and codefendant, could be said to connect Mr. Doe to the gun.

Lacking hard evidence of Mr. Doe's actual knowledge of or control over the gun, the prosecutor presented a police expert, who testified in response to a hypothetical question supposedly incorporating the facts of the case that the gun was available to all who lived in the house. Those hypothetical facts omitted, however, any

evidence that Mr. Doe actually knew of the gun or its location. Nevertheless, the jury convicted Mr. Doe.

Sentencing of Mr. Doe, however, was postponed for several years, during which time Mr. Doe served as an undercover agent and government witness, providing substantial assistance to law enforcement authorities. This assistance included exposing a jail guard's criminal activities and breaking up a prison drug ring, all at substantial risk to Mr. Doe's life and safety.

The United States Department of Justice valued Mr. Doe's assistance so greatly that it moved the sentencing judge to impose a sentence "below that prescribed by either the United States Sentencing Guidelines or the applicable mandatory minimum sentencing provisions of 21 U.S.C. § 841(B)(1)(A)(iii) and 18 U.S.C. § 924(c)." The court honored the government's request and imposed a 60-month sentence on each conviction to run concurrently, with credit for time served since the date of arrest.

The court also sealed all memoranda and motions related to the sentencing, as well as the case itself and the notice of appeal to the United States Court of Appeals for the District of Columbia Circuit, to prevent any disclosure to persons who might seek revenge against Mr. Doe as a result of Mr. Doe's law enforcement efforts. Mr. Doe's appeal is also sealed and his name is kept confidential. *See In re: Sealed Case*, D.C. Cir. No. 94-3009.

At the time of Mr. Doe's sentencing and of the filing of his notice of appeal, the District of Columbia Circuit had vacated its decision in *United States v. Bailey*, 995 F.2d

1113 (D.C. Cir.), *vacated, reh'g en banc ordered*, 4 F.3d 1004 (1993) and was considering that case *en banc*. Accordingly, by consent, the court stayed the briefing of Mr. Doe's appeal pending resolution of the *en banc* proceedings and any subsequent proceedings on writ of certiorari in this Court. Beyond question, Mr. Doe has a powerful interest in the outcome of this case.

SUMMARY OF ARGUMENT

What "use" of a firearm "during and in relation to" the act of cocaine possession sparks the special concern of Congress? The answer is, the same use that outrages the average citizen watching the seven o'clock news: the blatant, swaggering and reckless brandishing, threatening, and shooting of firearms that result in bodies in the street, children scurrying from playgrounds in fear, and peaceful residents of drug-infested neighborhoods cowering from their windows. Congress drafted 18 U.S.C. § 924(c) to deter *this* kind of outrageous conduct -- not mere constructive possession of or access to a weapon plus a prosecution expert's theory that such use may occur in the future.

Section 924(c) permits the federal government to jail a defendant only if that defendant "uses or carries" a firearm "during and in relation to" that defendant's commission of a crime of violence or drug trafficking. Necessarily, the statute does not apply to one, such as *amicus*, who is not proven even to have known of the existence or location of the firearm, or to one, such as *amicus*, who is

not proven to have dominion or control over the firearm. Beyond this, however, the plain meaning and the legislative history of the operative statutory words "uses" and "in relation to," understood in the context in which Congress chose those terms, require active employment of the firearm to accomplish the crime of violence or drug trafficking. Section 924(c) does not penalize a defendant for *thinking* about using a firearm -- it penalizes use.

Official statements by relevant Congressional committees and by individual Members and Senators confirm Congress' intent that Section 924(c) strikes only at active, immediate employment of firearms to facilitate drug dealing.

Here, the predicate offense is possession of cocaine with intent to distribute -- a continuing offense. If the facts otherwise prove guilt, a man can be convicted of this crime even though he be asleep when the police seize him. But it strains belief to think that Congress intended that a sleeping dealer be sent to jail for an additional five years because he "used" a gun to protect his drugs while he was sleeping, merely because there was a gun somewhere near the drugs. The mere fact that a firearm may be in the same automobile, the same room, or the same dwelling as the defendant or the defendant's drugs is simply insufficient to convict under Section 924(c).

To the extent that there is any ambiguity in the text of Section 924(c), the rule of lenity, and due process considerations of fair notice, require that the statute be construed to penalize only that conduct that the statute clearly outlaws -- active, immediate employment of a firearm. It is

unfair to jail anyone for five years based on a strained, expansive interpretation of a statute that does not, by its own words, give a layman fair notice of the conduct that will subject him to such a heavy penalty. Judicial respect for the authority of the legislative branch requires narrow construction of Section 924(c).

Finally, Section 924(c) must be construed to avoid any constitutional question concerning Congress' power to penalize the conduct in issue. The federal government has no general police power, and authority for every Congressional act must be expressed in one of the Constitution's enumerated federal powers.

Here, where the predicate offense relates to cocaine trafficking, Congress' power to regulate may be found only in the Commerce Clause. But in the context of the present cases, where interstate commerce itself is not the direct target of federal attention, the scope of federal action is limited to only that conduct that "substantially affects" interstate commerce. Section 924(c) lacks any requirement that the guns whose use is penalized have themselves moved in or otherwise substantially affected interstate commerce. Section 924(c) thus may constitutionally reach only that "use" of a gun "in relation to" drug trafficking that has a "substantial effect" on that drug trafficking. On the facts presented by petitioners and by *amicus*, the guns' effect on cocaine commerce is nonexistent.

Were the District of Columbia Circuit's interpretation of Section 924(c) correct, the statute as applied here would suffer from the same infirmity as that which

caused this Court to find the Gun-Free School Zones Act of 1990 unconstitutional: the conduct penalized (as opposed to future conduct, however likely to occur) simply has no effect on any commercial activity within the reach of federal power, and intrudes instead into the traditional realm of state regulation. *United States v. Lopez*, 514 U.S. ___, 115 S. Ct. 1624 (1995). Here, petitioners and *amicus* have been punished merely for passively possessing a firearm, on a theory that they "used" the firearm by possibly thinking about using it in the future.

Even if all such similar passive gun possessions nationwide are considered in aggregate for purposes of assessing the constitutionality of applying Section 924(c) to the present cases, it is that passive conduct (*lack* of conduct, to be more precise), and that conduct only, that may be aggregated. Thus, it must be presumed that every gun remains hidden and is not used to threaten, intimidate, or shoot. Even in aggregate, the effect of such passive gun possessions on interstate cocaine commerce simply is not sufficiently substantial to render those possessions subject to federal power. Regulation of such conduct is properly reserved to the traditional repository of the general police power in our federal system, the several States of the United States, or to their people, under the Tenth Amendment to the Constitution.

The potential or probable *future* use that may have been made of the guns in the instant cases, had petitioners and *amicus* not been arrested when they were, is irrelevant to

the construction of Section 924(c). Section 924(c) does not penalize potential future actions or intentions of any kind, and this Court's decision in *Lopez* teaches that the constitutionality of applying a statute to penalize one kind of conduct cannot be determined by reference to *different* potential or probable future conduct that might have been penalized by that or another statute, had that conduct occurred. These defendants cannot be jailed for acts these defendants did *not* commit.

ARGUMENT

I. Section 924(c) Penalizes Only Active and Immediate Employment of a Firearm

The error of the District of Columbia Circuit's *in banc* decision in *United States v. Bailey*, 36 F.3d 106 (D.C. Cir. 1994), *cert. granted*, ___ U.S. ___, 115 S. Ct. 1689 (1995), Joint Appendix ("J.A.") 78, stems from the circuit court's fundamentally flawed approach to the interpretation of 18 U.S.C. § 924(c) (1988). The circuit court's approach is to look first at the substantive drug possession necessary to prove the predicate offense, and only then to examine whether a firearm was "used" in some articulable manner "in relation" to that drug possession. The court thus interprets the terms "use" and "in relation to" as if the drafters of the legislation already had drug possession offenses in mind when selecting the key terms in issue in this case.

But the circuit court has it exactly backward. When Congress selected the terms "use" and "in relation to," it did not have nonviolent drug trafficking crimes such as possession in mind, but only violent crimes.

It is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. ___, ___, 113 S. Ct. 1993, 1996 (1993). Thus, while words may have many meanings as defined in the dictionary, "all but one of the meanings is ordinarily eliminated by context." *Id.*

In the context in which Congress chose the terms "use" and "in relation to," there can be only one meaning: the active employment of a firearm in a violent or threatening manner to substantially assist in the commission of a crime.

Amicus will not take up this Court's time repeating in detail the arguments that petitioners will make in support of this conclusion; but a few points are in order.

Congress first included the term "used, or intended to be used" in the original version of Section 924(c). *See* The Omnibus Crime and Safe Streets Act of 1968, Pub. L. No. 90-351, Title IV, § 902, 82 Stat. 233 (June 19, 1968). Congress later amended Section 924 by enacting the Gun Control Act of 1968, Pub. L. No. 90-618, Title I, § 102, 82 Stat. 1224 (Oct. 22, 1968). This Act provided, in pertinent part, for mandatory imprisonment of anyone who "uses a firearm to commit" a federal felony, or who carries a firearm "during the commission of" a federal felony. *Id.* This Act *deleted* the

term "intended to be used" that had appeared in the earlier version, thus clearly indicating that actual, immediate use -- not mere potential future use -- was the conduct to be penalized.

The House passed the Gun Control Act on July 24, the Senate on Sept. 18, and the conference report passed in each house on October 10 and 9 respectively. *See* 1968 U.S.C.C.A.N. 4410.

Throughout the debate over the Gun Control Act, and at the time of its passage, concaine possession for personal use was not a federal crime, while possession for other uses was federally punished merely as a *misdemeanor* on first offense. *See* The Drug Abuse Control Amendments of 1965, Pub. L. No. 89-74 §§ 3, 5, 7, 79 Stat. 229, 232, 233 (July 15, 1965); S. Rep. No. 337, 89th Cong. 1st Sess., *reprinted in* 1965 U.S.C.C.A.N. 1899-1900, 1905, 1906. Possession with intent to distribute only became a distinct felony offense *after* enactment of the Gun Control Act. *See* Amendments to the Federal Food, Drug and Cosmetic Act, Pub. L. No. 90-639, §§ 2,3, 82 Stat. 1361 (Oct. 24, 1968); S. Rep. No. 1609, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 4597, 4600-01, 4603.

Even after this date, however, "use" of a firearm as in petitioners' and *amicus'* cases would not have met the statutory test, because petitioners and *amicus* did not use any firearm in any manner that could be said "to commit" the possession of drugs. Under the Gun Control Act, petitioners and *amicus* did not "use" any firearm at all.

Subsequently, Congress amended the Gun Control Act and adopted the "in relation to" term, expressly limiting Section 924(c)'s penalty for firearm use to uses in relation to "crime[s] of violence." *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, Chapter X, Part D, § 1005, 98 Stat. 2138-39; S. Rep. No. 225, 98th Cong., 2d Sess. 312-14, *reprinted in* 1984 U.S.C.C.A.N. 3490-92. Again, the "use" term of the statute only penalized the active, immediate employment of a firearm. Conduct such as that of petitioners and *amicus*, being wholly nonviolent, remained wholly outside the statute.

Thus there can be no question that prior to the enactment of the Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a)(2), 100 Stat. 449, 456-57 (1986) ("1986 Amendment"), which added drug trafficking to the list of predicate offenses under the Gun Control Act, use of a firearm such as occurred here was not penalized by Section 924(c). But this Court need not take *amicus'* word for this conclusion. This Court may rely on the Solicitor General himself -- who, before the 1986 Amendment, argued precisely *amicus'* position in briefing to this Court in *McLaughlin v. United States*, 476 U.S. 16 (1986). *See Bailey*, 36 F.3d at 123-24, J.A. 114 (Williams, J., dissenting, quoting from page 19 & n.18 of the Solicitor General's brief in *McLaughlin*, Docket No. 85-5189). *Amicus* respectfully suggests that the Court ask the Solicitor General, at oral argument in this case, to confirm that he stands behind his *McLaughlin* brief and agrees that prior to the 1986 Amendment, the terms "use" and "in relation to" required active employment of a firearm.

Thus, if there is any basis to the argument that Congress intended these terms to encompass all conceivable conduct that arguably might be a "use" relating to drug possession with intent to distribute, the evidence must be found in the 1986 Amendment itself or in its legislative history. But those sources are barren of any nourishment for the circuit court's position.

Neither the text of the 1986 Amendment nor any scrap of its legislative history give the slightest indication that Congress intended to modify the terms "use" or "in relation to" to accommodate all the theoretical uses or hypothetical relationships that might be proposed as prosecutors began to apply Section 924(c) to drug possession offenses. Indeed, the 1986 Amendment defined "drug trafficking crime" as including "distribution, manufacture, or importation" but did not even mention possession with intent to distribute, *see* 1986 Amendment, 100 Stat. 457. Congress was well aware of the difference between distribution and possession with intent to distribute. *See* Drug Abuse Control Amendments of 1965, 79 Stat. 229, 232 (treating distribution and possession separately); Amendments to the Federal Food, Drug and Cosmetic Act, 82 Stat. 1361 (treating possession for distribution and other possession separately). If Congress had wanted to penalize passive firearm possession during a possession of drugs with intent to distribute, Congress certainly knew how to do so. Congress did not do so.

Obviously, Congress merely intended to add to the list of federal crimes that could serve as predicate offenses, without implicitly redefining the term "use" to encompass new

theories of "use" that might be proposed to make Section 924(c) applicable in any drug possession case where a gun happens to turn up in the evidence. *See, e.g.*, H.R. Rep. No. 495, 99th Cong., 2d Sess. 15, 17-18, 27, *reprinted in* 1986 U.S.C.C.A.N. 1327, 1341, 1343-44, 1353; 132 Cong. Rec. 6850, 6856, 6857 & 7081 (1986) (statements of Reps. Moore, Wirth & Gallo); 132 Cong. Rec. 9592, 9603 (1986) (statements of Sens. Hatch & McClure).

Even the circuit court admits that the legislative history merely shows that Congress "avoided any implication that it intended to narrow the relationship" between the firearm and the predicate offense, *see Bailey*, 36 F.3d at 116, J.A. 97-98. This begs the question of how broad that relationship was prior to the 1986 Amendment, and the circuit court makes no effort to show that the intended definitions of these key terms were as broad before the 1986 Amendment as the court asserts they were after that amendment. As stated above, the meaning of these key terms prior to the 1986 Amendment required active employment of a firearm.

The circuit court, rather than addressing the context in which Section 924(c) was enacted and amended, clings to an ancient case, tangentially noted by this Court in *Smith v. United States*, ___ U.S. ___, 113 S. Ct. 2050, 2054 (1993), involving a statute enacted by a Congress that adjourned 80 years prior to convening of the Congress that enacted Section 924(c). *See Bailey*, 36 F.3d at 114, J.A. 94, *citing Astor v. Merritt*, 111 U.S. 202 (1884). *Astor* concerned a customs statute and whether a man must wear a shirt in

order to avoid paying duty on it, and the context is obviously wholly different from the relevant context here.

The circuit court's heavy reliance on *Astor* flouts the rule in *Deal* because it takes a situation in which the context of the word "use" permits an expansive interpretation and applies it to a different situation in which the context excludes that interpretation. The circuit court's action was arbitrary. It could as easily have chosen to rely on a case in which the context ruled out all but a narrow interpretation of the terms in issue. *See, e.g., Public Citizen v. Department of Justice*, 491 U.S. 440 (1989) ("utilize," as used in the Federal Advisory Committee Act, interpreted narrowly). Indeed, as *amicus* shows below, *Public Citizen* would have been a better choice because in that case this Court interpreted the usage term narrowly to avoid a constitutional question, a situation similar to that presented here.

The circuit court's approach is, at bottom, mere result-oriented jurisprudence in which doctrines and precedents are selectively chosen or discarded in order to use Section 924(c) to strike at the drug trade. But Section 924(c) penalizes violence, and while violence is often associated with drug trafficking, drug possession with intent to distribute is not of itself violent. Accordingly, "use" of a gun in the ordinary sense of the word -- active employment as a weapon -- may occur very seldom, if ever, during those periods where mere possession is the only drug trafficking crime being committed.

Many drug possession fact-patterns simply do not involve any violence or threats. Thus, in order to stretch the statute to cover the conduct in issue, the circuit court is reduced to arguing, in substance, that Congress *sub silentio* reinterpreted the words "use" and "in relation to" when it added drug trafficking offenses to the list of predicate offenses under Section 924(c), such that merely knowing about a gun's proximity to contraband is now to be called "use" "in relation to" the possession offense. To the contrary, the government's theory of "use" as "emboldening" finds no support in the statute.

Merely thinking about using something is not "use" of it as Congress intended in Section 924(c). Given the complete lack of support for the government's position in the statute or in the legislative history, the circuit court's ruling was reversible error.

II. Lenity and Fair Notice Require That Section 924(c) Be Interpreted To Penalize Only Active and Immediate Employment of a Firearm

The rule of lenity is one of the most significant canons of construction of the criminal statutes. This Court articulated the rule in *United States v. Bass*, 404 U.S. 336 (1971), stating that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *Id.* at 348. The twofold rationale for the rule is, first, to avoid judicial intrusion upon Congress' duty to determine criminal penalties, and second, to provide fair notice regarding the

penal consequences of prohibited conduct. *Id.* As this Court explained over a century and a half ago,

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.
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> . . . .
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> . . . It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.

United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95-96 (1820).

This Court has reaffirmed the rule of lenity on many occasions. *See, e.g., United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952) (Congress must speak in "clear and definite" language before the judiciary may choose the harsher of two alternative readings of a statute); *Bifulco v. United States*, 447 U.S. 381, 387 (1980) ("this principle of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose").

This Court stated in *Moskal v. United States*, 498 U.S. 103 (1990), that the rule of lenity applies when "reasonable doubt" persists about the scope of a statute after the examining court has looked to the language and structure of the statute, the legislative history, and the motivating policy concerns of the statute. *Id.* at 108. Here, if the question presented is not already clearly answered in favor of petitioners and *amicus*, then it is certainly an issue that is unclear and debatable -- precisely a situation where the rule of lenity applies. *See Smith v. United States*, ___ U.S. ___, ___, 113 S. Ct. 2050, 2063 (Scalia, J., dissenting).

This Court has previously found Section 924(c) to require application of the rule of lenity, in deciding whether Congress meant Section 924(c) to apply where the predicate offense itself included sentence enhancement for use of a firearm. *See Simpson v. United States*, 435 U.S. 6, 14-15 (1978); *Busic v. United States*, 446 U.S. 398, 406-07 (1980). The Court properly deferred to Congress, which responded by clarifying its intent and thereby giving proper notice to the public of the penal consequences of the prohibited conduct. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2138 (1984); S. Rep. No. 225, 98th Cong., 2d Sess. 312-13, *reprinted in* 1984 U.S.C.C.A.N. 3490-91. Application of lenity here would similarly offer Congress the opportunity to consider and clarify its intent.

While this Court has once declined to invoke the rule of lenity regarding Section 924(c), on grounds that the statute unambiguously penalized the conduct there in issue (bartering a gun for drugs), *see Smith*, 113 S. Ct. at 2059-60

(1993), the Court's decision there addressed a completely different question than that presented here. The *Smith* case would be applicable here only if the government had prosecuted petitioners and *amicus* on the theory that they had "used" the guns in question because they could potentially have sold the guns along with drugs at some future time. The government has never offered such a theory as justification for imprisoning petitioners or *amicus*.

Several Circuits have applied the rule of lenity in construing Section 924(c). In *United States v. Lindsay*, 985 F.2d 666 (2d Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 103 (1993), the court faced the issue of whether a criminal who used multiple firearms in a single drug trafficking crime could be charged with multiple violations of Section 924(c). The court, by applying the rule of lenity, held that when the government linked multiple firearms to a single crime, only one Section 924(c) violation occurs. *Id.* at 674. The Fifth, Sixth, Tenth and Eleventh Circuits have reached the same conclusion on this issue. *See United States v. Privette*, 947 F.2d 1259 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1279 (1992); *United States v. Henry*, 878 F.2d 937 (6th Cir. 1989); *United States v. Moore*, 958 F.2d 310 (10th Cir. 1992); *United States v. Hamilton*, 953 F.2d 1344 (11th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 204 (1992). In *United States v. Jones*, 986 F.2d 42 (3d Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 3015 (1993), the court, by applying the rule of lenity, found that under Section 924(c), when a subsequent sentence for a drug offense is imposed by a court other than the court that

imposed the original sentence, the subsequent sentence can run concurrently and not consecutively. *Id.* at 43-44.

As noted above, the government now takes the opposite tack to that it pressed on this Court in briefing in *McLaughlin*, where the government asserted the position it now opposes. *See Bailey*, 36 F.3d at 123-24, J.A. 114 (Williams, J., dissenting). Regardless of whether the government may be entitled to change its mind, it cannot assert that its former position was unreasonable. Thus, the government cannot reasonably maintain that Section 924(c)'s "use" requirement is clear and unambiguous. Where a criminal statute is ambiguous, the rule of lenity applies, and the statutory ambiguity "should be resolved in favor of the narrow construction." *Bailey*, 36 F.3d at 124, J.A. 115 (Williams, J., dissenting). Narrowly construed, Section 924(c) does not penalize the conduct of petitioners and *amicus*. Their convictions must be reversed.

III. As Applied Here, Section 924(c) Must Be Construed To Penalize Only Uses of a Firearm That Substantially Affect Interstate Commerce, To Avoid Decision of a Significant Constitutional Question

A. The Circuit Court's Construction of Section 924(c) Unconstitutionally Exceeds Federal Power and Improperly Infringes on State Authority

Section 924(c) is not a statute whose constitutionality may be grounded solely on the constitutionality of a given conviction for the predicate offense. "[Section] 924(c) creates an offense distinct from the underlying federal felony." *Simpson*, 435 U.S. at 10. Accordingly, the constitutionality of applying Section 924(c) to petitioners and *amicus* is not answered by pointing solely to the constitutionality of convicting petitioners and *amicus* of the predicate drug trafficking offenses. Section 924(c) must stand on its own. *See, e.g., United States v. Hill*, 971 F.2d 1461, 1464 (10th Cir. 1992) ("a conviction and sentence under § 924(c) requires the full panoply of constitutional safeguards ordinarily granted criminal defendants"); *United States v. Nelson*, 27 F.3d 199, 200 (6th Cir. 1994) (same).

In certain rare cases, where a defendant is not charged with violating the predicate offense, or is charged but is acquitted, Section 924(c) may be employed to punish not merely the use of a firearm, but the underlying conduct supporting conviction for the predicate offense as well. *See,*

e.g., United States v. Laing, 889 F.2d 281, 288-89 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1069 (1990). In such a case, it may be that the constitutionality of applying the statute may depend solely on federal authority to penalize that underlying conduct, without regard to whether the use of the firearm substantially affected that conduct.

But the government here did not rely on Section 924(c) alone to punish petitioners and *amicus*. In the great majority of cases, such as those of petitioners and *amicus*, the defendant *is* charged and convicted of the underlying offense. In such cases, *Simpson*, 435 U.S. at 15, and *Busic*, 446 U.S. at 406-07, as well as Double Jeopardy concerns, *require* this Court to find that Congress intended Section 924(c) to punish *only* the additional "use" of the firearm, *not* the underlying offense itself. Both *Simpson* and *Busic* hold that Section 924(c) cannot be interpreted to punish conduct already penalized by a separate conviction for committing the underlying offense, absent clear direction from Congress. *Cf. United States v. Young*, 936 F.2d 1050, 1056 (9th Cir. 1991) (permitting enhanced punishment of firearm use under both Section 924(c) and 18 U.S.C. § 922(g) *only* because Congress expressly provided, in the Comprehensive Crime Control Act of 1984 following *Simpson* and *Busic*, that firearm use may be doubly punished). Notably, Congress has never said that the underlying conduct itself, other than firearm use, may be doubly punished under both Section 924(c) and the predicate statute.

Thus, where a defendant has been convicted of the predicate offense, Section 924(c) may be applied *only* as a penalty for the "use" of a firearm "in relation to" the underlying offense and not for the underlying offense itself. In this situation, the constitutionality of applying the statute must be assessed by reference *only* to the conduct that gives rise to the penalty, *exclusive* of the conduct that was an element of the underlying offense.

The legislative history of Section 924(c) relating to the statute's constitutional basis, although scant, supports *amicus'* position. The constitutional authority undergirding Section 924(c) was the Commerce Clause. *See United States v. Melville*, 309 F. Supp. 774, 776-78 (S.D.N.Y. 1970), (discussing the legislative history of the Gun Control Act). By limiting the application of his proposed amendment to the Gun Control Act to federal felonies, Rep. Poff, the sponsor of the amendment, hoped to avoid the policy questions attendant on converting state crimes into federal offenses and to relieve federal prosecutors of "the evidentiary burden of proving that the firearm moved in interstate commerce in order to establish Federal jurisdiction in each individual case." 114 Cong. Rec. 22,231, *cited in Melville*, 309 F. Supp. at 777. Clearly, Congress' intent in enacting Section 924(c) was to penalize the use of firearms to carry-out illegal conduct, not to penalize the underlying illegal conduct itself.

Thus, the constitutionality of applying Section 924(c) to petitioners and to *amicus* depends *not* on whether Congress has the authority to penalize possession of contraband, but solely on whether Congress has the

authority under the Commerce Clause to penalize the use of firearms that occurred here.

Amicus does not argue that Section 924(c) is facially unconstitutional. *Amicus* contends merely that, in certain circumstances -- as here -- application of the statute would be unconstitutional were this Court to adopt the circuit court's interpretation of the statute. *Cf. Ada v. Guam Society of Obstetricians and Gynecologists*, ___ U.S. ___, 113 S. Ct. 633 (1992) (Scalia, J., dissenting from denial of certiorari: "[t]he practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application in a similar context, but not to render it utterly inoperative").

Nor does *amicus* argue that Congress acts outside its enumerated authority by penalizing firearm use that substantially affects interstate commerce in drugs. But where no such substantial effect is caused by the conduct in issue in a particular case, regulation of that conduct is outside federal authority. *See United States v. Lopez*, 514 U.S. ___, ___, 115 S. Ct. 1624, 1630 (1995) ("the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce"). Thus, Congress' authority to penalize the use of firearms that occurred here depends on whether that use substantially affected commerce.

Neither petitioners nor *amicus* were proven to have used any firearm in any sense that substantially affected interstate commerce in contraband. Had Section 924(c) been intended to apply to petitioners' and *amicus'* use of firearms, it would have been unconstitutionally applied. Accordingly, this Court should follow its traditional rule and assume that

Congress meant to enact a statute wholly within the federal government's constitutional authority, and construe Section 924(c) as not applying to the firearm uses in issue here. *See, e.g., Public Citizen v. Department of Justice*, 491 U.S. 440, 465-66 (1989) (construing the term "utilized" not to apply to President's use of ABA Standing Committee on the Federal Judiciary, in order to avoid separation-of-powers concerns).

No court has yet been presented with a Commerce Clause challenge to application of Section 924(c) on facts such as are presented here. In those few cases where Section 924(c) has been questioned as exceeding federal authority under the Commerce Clause, the defendants had all been charged and convicted of appropriate predicate offenses, and Section 924(c) was properly applied to firearms use or carrying that by itself substantially affected interstate commerce. *See, e.g., Melville*, 309 F. Supp. at 778 (use of bombs to destroy federal military facilities); *United States v. Dumas*, 934 F.2d 1387, 1390 (6th Cir.) (carrying firearm while distributing crack), *cert. denied*, 502 U.S. 925 (1991); *United States v. Owens*, 996 F.2d 59, 61 (5th Cir. 1993) (guilty plea to firearms use during drug possession conspiracy); *United States v. McMillian*, 535 F.2d 1035, 1037 n.1 (8th Cir. 1976) (pistol-whipping during bank robbery), *cert. denied*, 434 U.S. 1074 (1978). *Cf. United States v. Thornton*, 901 F.2d 738, 741 (9th Cir. 1990) (upholding enhanced penalty for conviction for drug distribution, where distribution occurred near elementary school, because it regulates commerce in drugs by school children); *United States v. McDougherty*, 920 F.2d 569,

572 (9th Cir. 1990) (same; "[t]here is no legal reason why Congress cannot choose to punish some behavior [drug distribution near school] *affecting commerce* more harshly than other behavior" (emphasis added)), *cert. denied*, 499 U.S. 911 (1991).

Furthermore, even if application of Section 924(c) in the instant cases were constitutional, it would nevertheless impermissibly intrude into the traditional realm of state penal regulation. This Court announced in *Bass*, 404 U.S. at 349, that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." Congress, the Court reasoned, has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the states. Congress followed this rule when it first enacted Section 924(c), and has continued to respect the traditional realm of state primacy regarding the general criminal law. *See generally Melville, supra.*

Section 924(c), as applied to petitioners and *amicus*, destroys the federal-state balance. Currently, at least 32 states and the District of Columbia have criminal statutes substantially similar to Section 924(c)(1). *See* Ala. Code §§ 13A-5-6, 13A-11-56 (1975); Alaska Stat. § 12.55.125 (1994); Ark. Code Ann. § 5-73-211 (Michie 1987); Cal. Penal Code §§ 189, 12021.5, 12022.3, 12022.5 (West 1994); Conn. Gen. Stat. Ann. §§ 53-202, 53-202k (1994); D.C. Code §§ 22-3201(g), 22-3204(b), 33-541(a); Fla. Stat. ch. 775.087 (1992); Haw. Rev. Stat. §§ 134-6, 706-659, 660-660.1 (1988); Idaho Code § 19-2520 (1994); Ill. Comp. Stat. ch. 730, § 5/5-8-2 (Smith-Hurd 1992); Kan. Stat. Ann. § 21-4618 (1976); La.

Rev. Stat. Ann. § 14:94 (1986); La. Code Crim. Proc. Ann. art. 893.3 (West 1991); Me. Rev. Stat. Ann. tit. 17-A, § 1252 (West 1983); Md. Code Ann. Crim. Law Art. 27, §§ 36H-6, 281A (1957); Mass. Gen. Laws Ann. ch. 265, § 18B (West 1990); Mich. Comp. Laws § 750.227b (1991); Minn. Stat. § 609.11 (1987); Mont. Code Ann. §§ 45-8-303, 45-8-304, 46-18-221 (1978); Neb. Rev. Stat. §§ 28-416, 28-1205 (1943); Nev. Rev. Stat. § 193.165 (1973); N.H. Rev. Stat. Ann. § 651:2 (1971); N.J. Stat. Ann. § 2C:44-3 (West 1982); N.M. Stat. Ann. § 31-18-16 (Michie 1978); N.Y. Penal Law §§ 265.08, 265.09 (McKinney 1989); N.C. Gen. Stat. § 14-2.2 (1979); N.D. Cent. Code § 12.1-32-09 (1959); Or. Rev. Stat. §§ 161.610, 475.996 (1993); 18 Pa. Cons. Stat. § 4416 (1939); R.I. Gen. Laws § 11-47-3.1 (1956); S.C. Code Ann. § 16-23-490 (Law. Co-op. 1976); Utah Code Ann. § 76-3-203 (1953); Va. Code Ann. § 18.2-53.1 (Michie 1950); Wyo. Stat. § 6-8-101 (1977).

These statutes impose either a mandatory minimum or an extended sentence against criminals who use or carry a firearm while possessing drugs with intent to distribute. For example, in North Carolina, "if a person is convicted of a . . . felony and the person used, displayed, or threatened to use or display a firearm during the commission of the felony, the person shall, in addition to the punishment for the underlying felony, be sentenced to a minimum term of imprisonment for 60 months." N.C. Gen. Stat. § 14-2.2. Likewise, a person convicted in Connecticut for a class A, B or C felony and while committing such felony "uses, or is armed with and threatens the use of . . . any firearm, . . . shall be imprisoned for a term of five years, which shall not be suspended or

reduced and shall be in addition and consecutive to any term of imprisonment imposed for conviction of such felony." Conn. Gen. Stat. Ann. § 53-202k.

Indeed, the District of Columbia Law Enforcement Amendment Act of 1989, D.C. Law 8-120 § 3, 37 DRC 24, 25-26 protects the people of the District every bit as much as Section 924(c), if not more so. *See* D.C. Code §§ 22-3204(b) (imposing mandatory five to fifteen year sentence for firearm possession during "dangerous crime") and 22-3201(g) ("dangerous crime" defined as including possession with intent to distribute contraband).

The question thus is not whether the firearm conduct proven here may be punished. The issue is who has authority to mete out the punishment. Nothing stops the states from penalizing this conduct, and most states have already done so. What stops the federal government is the Constitution and due respect for the traditional primacy of the states in enforcing the general police power to protect the people.

This Court has recently reaffirmed its respect for our American system of divided government by enforcing the constitution's separation of state authority from federal authority. *See, e.g., Lopez*, 115 S. Ct. at 1631 (firearm possession ban unconstitutionally exceeded Commerce Clause power and violated the Tenth Amendment where there was no statutory requirement that the possession substantially affect interstate commerce); *U.S. Term Limits, Inc. v. Thornton*, ___ U.S. ___, ___, 115 S. Ct. 1842, 1872, 1873 (1995) (Kennedy, J., concurring: "[t]he Framers split the atom of

sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. . . . [T]he federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States. *See United States v. Lopez* [citation omitted]."). The present cases once again invoke this Court's duty to police the boundary between the state and federal realms.

There is nothing inherently "federal" about a firearm. The government's theory of "use" as "emboldening" proves too much, because there is no area of traditional state regulation that cannot be reached by such a theory. The theory would permit, for example, enhanced federal penalties if the drugs were stored in a house with a lock on the front door, because the lock "emboldened" the defendant to keep drugs inside; would permit enhanced federal penalties if there were a trash can nearby, because the defendant might have thought about using the trash can as a hiding place for the drugs; would permit enhanced federal penalties if the defendant owned a car, because the drug dealer would "use" the car by thinking about the possibility that he could drive it to buy or sell drugs or to escape robbers or the police; and would permit enhanced federal penalties for owning clothes, because the defendant would not go out on the streets naked and thus the clothes "embolden" the defendant to go out in public to engage in commerce. The fact that these examples may sound absurd does not rebut the point that under the government's theory, all of them would be matters of federal concern punishable by federal penalties. The problem with

the government's "emboldening" theory is the same as that identified in *Lopez:* under the government's theory, "it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States have historically been sovereign." 115 S. Ct. at 1632.

B. The Government May Not Convict These Defendants by Pointing to Acts That These Defendants Did Not Commit

Amicus began his argument herein by recognizing that firearm violence in drug trafficking is a serious national problem well within the jurisdiction of Congress to address. But neither *amicus* nor petitioners committed any act of firearm *violence*. Petitioners and *amicus* cannot be convicted for acts they did not commit.

Examination of this Court's *Lopez* decision makes this abundantly clear. The dissenting Justices relied heavily on evidence of actual firearm violence in the schools to justify their position that the Gun-Free School Zones Act constitutionally regulated interstate commerce -- evidence which the majority and concurrences properly disregarded, because it was not *that* conduct for which the government penalized Lopez. Lopez was arrested for carrying a hidden gun near a school -- not for brandishing it in class. Even accepting all the dissent's arguments regarding the substantial effect of schooling on interstate commerce, the fact remained that Lopez' *act* -- carrying a hidden gun near the school -- of itself had *no* effect on the school's operations. *See Lopez*,

115 S. Ct. at 1634 ("[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce"), 1650 (Thomas, J., concurring, but criticizing the Court's "repetition elsewhere" principle of aggregation because it "has no stopping point.").

The same is true here. Petitioners and *amicus* simply have not committed any of the acts Congress sought to penalize in Section 924(c). Their convictions must be reversed.

CONCLUSION

For the reasons stated, *amicus* respectfully submits that petitioners' convictions under Section 924(c) should be reversed.

Respectfully Submitted,

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